(9)

No. 04-1618
Title: Northern Insurance Company of New York, Petitioner
v.
Chatham County, Georgia
Docketed: June 3, 2005
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (04-13308)
Decision Date: January 28, 2005
Rehearing Denied: March 4, 2005
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 1 2005	Petition for a writ of certiorari filed. (Response due July 5, 2005)
Jun 28 2005	Brief of respondent Chatham County, Georgia in opposition filed.
Jul 13 2005	DISTRIBUTED for Conference of September 26, 2005.
Oct 3 2005	DISTRIBUTED for Conference of October 7, 2005.
Oct 11 2005	Petition GRANTED.
Oct 17 2005	The order granting the petition for a writ of certiorari is amended to read: The petition for a writ of certiorari is granted limited to the following question: "Whether an entity that does not qualify as an 'arm of the State' for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit?"
Nov 17 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 16, 2005.
Nov 30 2005	SET FOR ARGUMENT on Wednesday, March 1, 2006.
Nov 30 2005	Letter from counsel for the petitioner giving blanket consent for the filing of amicus briefs in support of either or neither party received.
Nov 30 2005	Letter from counsel for the respondent giving blanket consent for the filing of amicus briefs in support of either or neither party received.
Dec 16 2005	Joint appendix filed.
Dec 16 2005	Brief of petitioner Northern Insurance Company of New York filed.
Dec 16 2005	Brief amicus curiae of United States filed.
Dec 20 2005	CIRCULATED.
Jan 6 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 6 2006	Extension of time within which to file respondent's brief on the merits to and including February 3, 2006.
Jan 23 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 2 2006	Brief of respondent Chatham County, Georgia filed. (Distributed)
Feb 3 2006	Brief amicus curiae of Southeastern Pennsylvania Transportation Authority filed. (Distributed)
Feb 6 2006	Record received from U.S.C.A. - 11th Circuit. (1 box)
Feb 17 2006	Reply of petitioner Northern Insurance Company of New York filed. (Distributed)
Mar 1 2006	Argued. For petitioner: Miguel A. Estrada, Washington, D.C.; and Dan Himmelfarb, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United

States, as amicus curiae.) For respondent: R. Jonathan Hart, Chatham County Attorney, Savannah, Ga.

FILED

041618 JUN 1 = 2005

OFFICE OF THE CLERK

No. 04-

IN THE

Supreme Court of the United States

ZURICH INSURANCE CO. subrogated to the rights of JAMES K. LUDWIG, JR. and CAROL C. LUDWIG,

Petitioner,

v.

CHATHAM COUNTY, GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this action, the Appellate Court affirmed the decision of the United States District Court Southern District of Georgia Savannah Division holding that the County was entitled to sovereign immunity in a case involving a case involving a hazard to navigation from a drawbridge collapsing onto a boat sailing beneath the defective bridge while it was raised causing extensive damage, thereby creating a conflict of authorities between the Georgia Court of Appeals for the Eleventh Circuit and the Supreme Court of Georgia, the Constitution and statutes of the State of Georgia, and rulings of the U.S. Supreme Court. The questions presented are:

1. Did the U.S. District Court and Court of Appeals err in ruling that sovereign immunity applied to a county which negligently operated and maintained a drawbridge over navigable waters, which collapsed while raised for passage of a yacht, which bridge had collapsed previously causing damage to the yacht involved in this lawsuit and other yachts previously, contrary to the U.S. Supreme Court and of the Supreme Court of Georgia rulings which denied sovereign immunity as that would conflict with maritime law thereby creating a conflict under rulings of the U.S. Supreme Court and the Supreme Court of Georgia.

2. Did the United States District Court and the Court of Appeals err in ruling that the county was entitled to sovereign immunity for damage to a yacht traveling under a drawbridge constructed, operated, and maintained by the County which damage was caused by the collapse of the bridge while raised for passage of the yacht as Georgia law provides that if a county has a duty to repair and maintain the roads and bridges

within the county, have the necessary authority to carry out that duty, then the county must also bear the liability for any defective bridge for damages occurring resulting from such repairs provided the county has not obtained a performance bond (which was not obtained for this bridge at the time of this damage). O.C.G.A. § 32-4-71, thereby creating a conflict between the rulings of the Eleventh Circuit, the U.S. Court of Appeals, and Georgia statutory law.

3. Did the U.S. District Court and U.S. Court of Appeals err in determining that a Defendant/Appellee, Chatham County, as a political subdivision of the state was an "arm of the state" when the County alone would be responsible for satisfying the adverse judgment, and the State of Georgia has no control over the maintenance and operation of the bridge all of which would be required if the state is to be granted sovereign immunity in this claim thereby being in conflict with the same Court's ruling in *Vierling v. Celebrity Cruises*, 339 F.3d 1309 (11th Cir. 2003).

4. Did the court err in ruling that Chatham County is entitled to sovereign immunity even though the damages inflicted on the Plaintiffs were caused by the negligent performance of ministerial act and the creation of a continuing nuisance which the Constitution of the State of Georgia provides that sovereign immunity is not granted in such instances, thereby creating a conflict between the ruling of the U.S. Court of Appeals for the Eleventh Circuit and the Constitution of the State of Georgia.

5. Did the U.S. District Court and the U.S. Court of Appeals err in dismissing the plaintiffs' claim on the grounds of residual common law and sovereign immunity thereby ignoring the numerous cases decided by the U.S. Supreme

Court which held state and local government authorities responsible for creating hazards to navigation.

6. Did the U.S. District Court and the U.S. Court of Appeals err in holding that "residual sovereign immunity" (quotation marks inserted by Court) that arises from common law applies which was referred to in page 6 of the District Court Order does not have that quoted language nor does any opinion of any appellate court in the State of Georgia contain such quoted language of "residual sovereign immunity" (quotation marks inserted by Court) as to justify granting sovereign immunity on that questionable ground as opposed to 11th amendment sovereign immunity?

7. Did the U.S. District Court and the U.S. Court of Appeals for the Eleventh Circuit err in relying on *Federal Maritime Commission v. State of South Carolina State Ports Authority*, 535 U.S. 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2d 962 as authority for granting the defendant "residual sovereign immunity" (quotation marks inserted by Court) which does not mention "residual sovereign immunity" (quotation marks inserted by Court) thereby creating and magnifying the conflict between Georgia case law, Georgia statutory law, Georgia constitutional law, and the U.S. Supreme Court decisions which should have precluded sovereign immunity as a defense for the county?

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OPINIONS BELOW

The opinion of the United States District Court Southern District of Georgia Savannah Division is styled as *Zurich Insurance Company subrogated to the rights of James K. Ludwig and Carol C. Ludwig v. Chatham County, Georgia,* which is unreported. (App. B).

The opinion of the Court of Appeals for the Eleventh Circuit is unreported. (App. A).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on January 28, 2005. (App. C). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Georgia's Constitutional Art. I, Sec. II, Par. IX (d) states,

> . . . all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance or the negligent failure to perform the ministerial functions and may be liable for injuries and damages if they act with actual malice, or with actual intent to cause injury in the performance of their official functions. . . .

Art. I, Sec. II, Par. IX (e) 1991 Amendment to Georgia Constitution provides sovereign immunity extended to the "state and all of its departments and agencies" except to the extent provided for by the Georgia Legislature.

O.C.G.A. § 32-4-71(b): If the condition of bridge repair authorized by Code Section 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county or counties, provided that the county shall be discharged from all liability upon the inclusion in the performance bond of the aforesaid bridge repair condition.

OCGA § 32-4-02

O.C.G.A. § 32-4-41

OCGA §§ 32-4-70 – 32-4-71

O.C.G.A. § 50-21-22(5).

O.C.G.A. § 48-5-220(4)

O.C.G.A. § 32-4-70(b)

STATEMENT OF THE CASE

This action seeks recovery of damages to the Catalina yacht, identified as "LOVE OF MY LIFE," which it sustained while passing under the Causton Bluff Bridge in Savannah, Georgia on October 6, 2002.

Causton Bluff Bridge is a drawbridge which is owned, operated and maintained by Chatham County and spans the Wilmington River, a navigable body of water which is part of the Intercoastal Waterway.

On October 6, 2002, James K. Ludwig was sailing his vessel "LOVE OF MY LIFE" on the Intercoastal Waterway. He contacted the bridge operator and requested that the bridge be raised to allow his vessel to sail beneath the bridge. The bridge tender opened the bridge by raising the spans and the Northwest span did not remain in its raised position, but drifted down, causing the vessel to strike the span. The Plaintiffs' Expenses amounted to $137,987.67.

The falling span caused damage to other vessels beginning in 1990 when it fell, striking a vessel. This occurred several times thereafter.

The County performed repairs and maintenance on the bridge, especially the locking mechanisms on several occasions.

After suit was filed and discovery commenced, the trial court granted the Defendant's Motion for Summary Judgment based on common law sovereign immunity. In granting the Motion, the Court ignored and did not discuss the issue of whether the maintenance and repair of a bridge by a county constituted ministerial acts for which the Constitution of the State of Georgia (Article 1, § 2, Par, 9) specifically exempts ministerial acts from sovereign immunity and authorizes suit against the governmental bodies for negligent performance of ministerial acts. Moreover, the courts must have been aware of the issue because the District Court used the case of *Kordares v. Gwinnett County,* 220 Ga. App. 848, 849-50, 470 S.E.2d 479 (1996) for the authority that "merely building and operating roads and bridges does not waive its sovereign immunity". *Kordares, supra* However, that cited case to which the Court gave deference does not apply to the conduct of the county in the instant case. In *Kordares*, the county and

its employees were entitled to sovereign immunity because the plaintiff's contention was that the county failed to perform a subsurface inspection of the bridge. The act of performing an inspection is a discretionary act as stated by the *Kordares* court and therefore Georgia law was followed in the *Kordares* case. It was not followed in the instant case because the county employees performed maintenance and repairs of the bridge which are ministerial acts for which sovereign immunity does not apply. *Brannen v. City of Brunswick,* 49 Ga. App. 62, 174 S.E. 186; *Joyce v. VanArsdale,* 196 Ga. App. 95, 395 S.E.2d 275; *Miree v. United States,* 490 F. Supp. 768 (M.D. Ga. 1980). *Kordares* also refutes another erroneous statement of law in the District Court that the fact that the "County has immunity-waiving insurance, and Plaintiff has not otherwise shown that the County's sovereign immunity was waived . . ." (USDC opinion p.10-11) is in conflict with the *Kordares* case which holds that doctrine of sovereign immunity applies regardless of purchase of liability insurance. *Kordares v. Gwinnett County,* 220 Ga. App. 848, 849-50, 470 S.E.2d 479 (1996) Likewise, it created a conflict when it ignored the U.S. Supreme Court case of *Workman v. Mayor of New York City,* 179 U.S. 552, 21 S. Ct. 212, 21 L. Ed. 314 declaring that admiralty law supercedes state law governing sovereign immunity. In addition, the Supreme Court of Georgia ruled in the case of *Hines v. Georgia Ports Authority,* 278 Ga. 631, 604 S.E.2d 184, which ruling was made after the ruling of the trial court but prior to the ruling affirming the trial court's decision by the U.S. Court of Appeals for the Eleventh Circuit, which court was apprised of the *Hines* ruling and which followed the *Workman, supra,* decision citing it, and holding that admiralty law supercedes state law involving sovereign immunity, thereby creating a conflict between the U.S. Court of appeals for the Eleventh Circuit and the Supreme Court of Georgia.

REASONS FOR GRANTING THE PETITION

The opinion of the U.S. Court Appeals for the Eleventh Circuit in this case has created a fictitious standard of sovereign immunity by referring to "residual sovereign immunity" as referred to in the case of *Federal Maritime Commission v. State of South Carolina State Ports Authority,* 535 U.S. 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2d 962. The Federal Maritime Commission ruling by the U.S. Supreme Court does not refer to residual sovereign immunity. Yet, the U.S. Court of Appeals for the Eleventh Circuit cited that case and, in doing so, referred to the authority of Gilbert v. Richardson which opinion did not provide any exceptions for residual sovereign immunity. Therefore, a conflict was created between all opinions involving sovereign immunity of any court and jurisdiction and the ruling of the U.S. District Court and the U.S. Court of Appeals for the Eleventh Circuit applying residual sovereign immunity as authority for granting sovereign immunity to the County in this case in spite of the fact that Georgia Statute and Constitutional law expressly waives sovereign immunity in a case with these facts.

The opinion of the U.S. Court of Appeals for the Eleventh Circuit in this case is in conflict with a ruling of The United States Supreme Court in the case of *Workman v. Mayor of New York City* (179 U.S. 552) in which the U.S. Supreme Court ruled that state conferred immunity is preempted by admiralty law, whereas the appellate court opinion in this case which affirmed the opinion of the trial court held that sovereign immunity applies in spite of the bridge in question having created a hazard to navigation, and in spite of Georgia constitutional and statutory law that held the acts of the county in repairing and maintaining a bridge are ministerial

in nature and sovereign immunity does not apply. (Citing *Brannen v. City of Brunswick,* 49 Ga. App. 62, 174 S.E. 186; *Joyce v. VanArsdale*, 196 Ga. App. 95, 395 S.E.2d 275; *Miree v. United States,* 490 F. Supp. 768 (M.D. Ga. 1980). Thereby creating a conflict between the Circuit Court opinions and Georgia Appellate Court opinions.

The District Court's June 28, 2004 Order, as affirmed by the Eleventh Circuit Court of Appeals by an Order dated January 28, 2005, is in conflict with the decision of the Supreme Court of Georgia in *Hines v. Ga. Ports Auth.,* 278 Ga. 631, 604 S.E. 184 (2004), overruling the decision in the trial court and intermediate appellate court's granting sovereign immunity to the Georgia Ports Authority in a case involving injury to a longshoreman working on a container ship who was struck by a crane negligently operated by an employee of the Georgia Ports Authority even though the Georgia Ports Authority enjoyed immunity under the Georgia State Constitution in favor of the ruling of the U.S. Supreme Court in *Workman v. Mayor of New York City* (179 U.S. 552), which was cited and which held that state conferred immunity is preempted by admiralty law.

Though the *Hines* decision involves the application of Eleventh Amendment sovereign immunity and not the "residual sovereign immunity" relied upon by the District Court, the decision still has a direct impact on the basis for the District Court's June 28, 2004 order which relied on Georgia's extension of sovereign immunity. It stated "Plaintiff does not dispute that counties exercise state power to acquire land and build and operate bridges. *See* OCGA § 32-4-02 (preamble (enumerating state's delegation of its powers to a county with respect to county road systems); *id.* at (3)(A) (counties may exercise the state's power to

condemn land for roads); *id.* at (8) & (11) (county can exercise the state's power to tax for road-building/maintenance purposes); OCGA §§ 32-4-70 – 32-4-71 (governing county authority to construct, reconstruct and repair bridges, payment bonds for same). (Opinion p.10)

Continuing, the trial court stated,

> By acquiring the land, constructing, and operating the bridge in question, the County was exercising these state powers. Merely building and operating roads and bridges does not waive its sovereign immunity. *Kordares v. Gwinnett County,* 220 Ga. App. 848, 849-50, 470 S.E.2d 479 (1996); *see also Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir. 1993) (noting that in absence of waiver, Georgia' sovereign immunity extends to counties as subdivisions of the state) In fact, it is Plaintiff's burden to show a waiver. *Smith v. Chatham County,* 264 Ga. App. 566, 567-68, 591 S.E.2d 388 (2003).

(Opinion p.10). These courts refused to accept that this burden was carried by the plaintiffs when they cited *Workman v. Mayor of New York City,* 179 U.S. 552, 21 S. Ct. 212, 45 L. Ed. 314, which held that admiralty law would supercede state law granting sovereign immunity to the state and counties; *Christy v. Pennsylvania Turnpike Commission,* 54 F.3d 1140, ruling that the party asserting the defense of sovereign immunity bears the burden of proving its entitlement thereto; and O.C.G.A.§ 32-4-71(b) the Georgia law which expressly holds the county liable for injuries caused by reason of any defective bridge foreclosure. The Georgia Constitution, Art. I, Sec. II, paragraph 9(d) states that sovereign immunity does not apply to the negligent

performance of ministerial acts, which occurred in this case involving maintenance and repair of the drawbridge over navigable waters.

Thus, the District Court's order of June 28, 2004 is entirely premised and focused on the application of state legislated sovereign immunity with regard to the question of whether Chatham County is entitled to assert sovereign immunity as a defense in this case. However, the trial court's reference to the decision in *Kordares v. Gwinnett County*, 220 Ga. App. 848, 849-850 (1996) stating "merely building and operating roads does not waive its sovereign immunity" is incomplete in omitting the discretionary acts performed which eliminates that case as authority for the ministerial acts negligently performed in this case. The Court in *Kordares* determined that sovereign immunity bars any action for personal injury or wrongful death against a county arising from nuisance or inverse condemnation. The *Kordares* decision focused exclusively on the doctrines of sovereign immunity for negligently performed discretionary acts and official immunity as promulgated in Art. I, Sec. II, Par. IX of the Georgia Constitution of 1983, as amended in 1991 which dealt with exemptions for negligent performance of ministerial acts for which there is no sovereign immunity exemption. The *Kordares* decision did not focus on the State of Georgia's sovereign immunity under the United States Constitution nor the statute declaring counties are liable in Georgia for damages cause by defective bridges, O.C.G.A 32-4-71(b) and should not have been employed as authority for the ruling in this case.

The trial and appellate courts relied on an interpretation of Georgia law that had been revoked and changed by the adoption of a constitution amendment in 1991 that applied

to the damage that occurred to the plaintiffs' property in 2002. It is evident from reading the trial court's order that it also relied upon the decision in *Smith v. Chatham County*, 264 Ga. App. 566 (Ga. App. 2003). The *Smith* decision, makes reference to "no immunity waiving insurance" and "it is Plaintiff's burden to show a waiver" which again, solely focuses on a county's sovereign immunity under the Georgia State Constitution. The *Smith* decision is distinguishable because it does not focus on the State of Georgia's sovereign immunity under the United States Constitution and which is refuted by the *Kordares* case (supra) as it relates to the purchase of liability insurance. Finally, the Eleventh Circuit's decision in *Kitchen v. CSX Transportation,* (6 F.3d 727, 731 (11th Cir. 1993)), which is also cited in the trial court's decision, turns on the facts that

> Under the Georgia Constitution a county waives its sovereign immunity to the extent of liability insurance coverage." However, this reference to the *Kitchen* case in the insurance coverage context is an extreme departure from the principal ruling of the same Eleventh Circuit Court of Appeals that the allegedly negligent acts of the county official in connection with erecting and maintaining barricades and signs were of ministerial character . . .

Kitchen v. CSX Transportation, (6 F.3d 727, 731 (11th Cir. 1993)). Most important is that the plaintiff's injury in the *Kitchen* case occurred in 1988, prior to the 1991 amendment to the Georgia Constitution which revoked, recanted, repealed and decidedly abolished that provision of the Georgia Constitution which so misled the trial and appellate court in their rulings in this case. (*See Kodares, supra* at 220 Ga. App. 849)

A review of the final paragraph preceding the conclusion of the District Court's order clearly reveals that this Court based its determination of Chatham County's sovereign immunity on Chatham County's state legislated sovereign immunity under the Georgia Constitution. It also reveals that the District Court did not base its determination on the State of Georgia's sovereign immunity under the United States Constitution as it states:

> In this case, the County has no immunity-waiving insurance, and plaintiffs have not otherwise shown that the State or County waived the County's sovereign immunity. Nor is the County otherwise before the Court but attempting to invoke an admiralty-preempted state statute aimed at defeating or impinging admiralty law. (Opinion p.10)

However, the presence or absence of insurance is not to be considered in determining whether the government entity is entitled to sovereign immunity as this law was changed in 1991. (*See Kodares, supra*) Prior to the 1991 amendment, Art. I, Sec. II, Par. IX of the 1983 Constitution provided for a waiver of sovereign immunity for any claim against "the state or any of its departments and agencies" to the extent of any liability insurance. Under the 1983 Constitution the courts interpreted the phrase "the state or any of its departments and agencies" to *include* counties, county school boards, municipalities, Board of Regents, and hospital authorities. *See Hiers v. City of Barwick*, 262 Ga. 129, 414 S.E.2d 647 (1992) (municipalities); *Wilson v. Bd. Of Regents, et., of Ga.*, 262 Ga. 413, 419 S.E.2d 916 (1992) (Board of Regents); *Culberson v. Fulton-Dekalb Hosp. Auth.*, 201 Ga. App. 347, 411 S.E.2d 75 (1991) (hospital authorities);

Thigpen v. McDuffie County Bd. Of Ed., 255 Ga. 59, 335 S.E.2d 112 (1985) (counties and county school boards). The 1991 amendment to Art. I, Sec. II, Par. IX of the 1983 Georgia Constitution (1991 amendment) provided sovereign immunity extended to the "state and all of its departments and agencies," except to the extent provided for by the Georgia legislature. Under the Georgia Tort Claims Act (GTCA), although the "state" previously waived its sovereign immunity to the extent of insurance, the statute specifically *excludes* "counties, municipalities, school districts, other units of local government, [or] hospital authorities" from the definition of "state." O.C.G.A. § 50-21-22(5).

Given the District Court's terminology in deciding this case, it is obvious that the Court's decision was erroneously based upon the belief that Chatham County did not waive its' **state legislated sovereign immunity** by not having immunity waiving insurance since sovereign immunity under the United States Constitution can not be waived by insurance. Moreover, the last sentence of this Court's order clearly references the Plaintiff's arguments that Chatham County's **state legislated sovereign immunity** was waived by virtue of a state statute. (emphasis ours) (Order, June 28, 2004, p. 10.)

Petitioners respectfully submit that there is no indication from the District Court's order, as affirmed, that the Court's determination of the case was based on a review of the uniformly accepted and followed elements for determining the entitlement of a county to assert a state's sovereign immunity under the United States Constitution nor the fact that Georgia appellate courts have ruled that bridge maintenance constitutes a ministerial act, nor the Georgia statute that the county shall be primarily liable for all injuries

caused by reason of any defective bridge for damages, O.C.G.A. § 32-4-71(b) nor that the repeated failure of the bridge to remain upright and fall onto a passing vessel constitutes a continuing nuisance. (*See Brannen v. City of Brunswick, supra,* and *City of Bowman v. Gunnells,* 243 Ga. 809, 256 S.E.2d 782)

As Plaintiffs argued to the District Court and to the Eleventh Circuit Court of Appeal, in the interest of uniform application of maritime law, federal courts exercising admiralty jurisdiction are not bound by local laws limiting the liability of governmental agencies; admiralty courts traditionally rely upon federal maritime law, rather than state statutory law, in assessing claims of sovereign immunity, citing *See Workman v. New York City,* 179 U.S. 552, 573-574 (1900). The United States Supreme Court in *Workman* determined that local law does not control maritime law and, therefore, cannot prevent liability of a municipal corporation for a maritime tort. (*Workman, supra*)

Likewise, where immunity was held to be in effect in the case of ex parte New York (256 U.S. 490, 65 L. Ed. 1057, 41 S.E. 588, the Court in that case concluded that State immunity from suit applied in admiralty and maritime jurisdiction matters unless the State had given its consent. Applying that law to the State of Georgia and its application to Chatham County, the District Court had already been apprised of the provisions in the Constitution of Georgia which provided express permission to sue for damages for ministerial acts thereby precluding the defense of sovereign immunity. Ga. Constitution, Article 1, Section 2, Par. 9 (d) and the Georgia law declaring the county primarily liable for damages caused by defective bridges. O.C.G.A. § 32-4-71(b).

The Georgia Supreme Court in *Hines v. Georgia Ports Authority, supra* reached this same conclusion. The Court in *Hines* determined that the Georgia Ports Authority enjoyed immunity under the Georgia State constitution but stated "however, the United States Supreme Court held in *Workman v. Mayor of New York City, supra* that **state-conferred immunity is preempted by admiralty law.** Thus, the Ports Authority **does not enjoy state-conferred immunity** *for the* Hines's **claims that sound in admiralty law**." 278 Ga. 631, 604 S.E.2d at 191-192. (*Emphasis added*).

A review of the order in this case demonstrates that the District Court's determination of this case, as affirmed by the Appellant Court, was based upon grounds which are clearly erroneous following the issuance of the Georgia Supreme Court's holding that "state-conferred immunity is preempted by admiralty law" in *Hines v. Georgia Ports Authority*, (278 Ga. 631, 604 S.E.2d at 191-192) which thereby created the conflict between the opinion of the highest state court in Georgia and the U.S. Court of Appeals which decides cases arising out of Georgia.

The correct test for determining whether a political subdivision of Georgia is an "arm of the state" was not applied by the lower courts in deciding this case.

The Georgia Supreme Court's decision in the *Hines* case *supra* serves to correct the District Court's rejection of the *Vierling v. Celebrity Cruises* analysis by making it the applicable standard for use when evaluating the application of sovereign immunity of Georgia State agencies. *Vierling v. Celebrity Cruises,* 339 F.3d 1309, 1313-1315 (11th Cir. 2003) In *Vierling,* the Eleventh Circuit held that the Port Authority was not entitled to sovereign immunity as it was financially

self-sufficient, generated its own revenues, and paid its own debts. Furthermore, (the Eleventh Circuit reasoned), "**the state has no control over the operation of the facility and Florida law treats the Port Authority, as an entity of the county, not of the state**." *See Vierling v. Celebrity Cruises*, 339 F.3d at 1315 (*Emphasis added*).

Because of the Georgia Supreme Court's adoption of *Vierling* in *Hines v. Georgia Ports Authority, supra,* at page 93 certiorari should be granted and the District Court's June 28, 2004, order as affirmed in the appellate court must be reversed because the Georgia Supreme Court has already tacitly recognized that Chatham County cannot serve as an arm of the state under the *Vierling* test. In order to remove any confusion as to why Chatham County is not an "arm of the state" under the *Vierling* test the Plaintiffs provide the following review of the applicable facts and law.

In *Vierling*, the Eleventh Circuit stressed the importance of determining whether the state or the county would ultimately be responsible for satisfying any adverse judgment. 339 F.3d at 1314. Specifically the Eleventh Circuit noted:

> Although no single factor is dispositive, the third factor, the source of the entity's funds and responsibility for satisfying judgments, is "of considerable importance." *Doe,* 519 U.S. at 430, 117 S. Ct. at 904. "Thus, when an action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit." *Id.* at 429, 117 S. Ct. at 903-04 (*internal quotation marks omitted*).

339 F.3d at 1314. (*citing Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997)).

Respondent Chatham County has admitted that the State of Georgia will not have any financial liability, whatsoever, for any judgment entered against Chatham County. (*See* Exhibit A to this Motion for Relief from Judgment containing responses to Plaintiff's Second Set of Requests for Admission), *Continental Ins. Co., subrogated to rights of Dennis K. Rings v. Chatham County, USDC, Southern District of Georgia, Savannah Division, Civil Action No. 403-038, In re Herb Goetz & Marlen Horn Associates, Inc.,* 120 F.3d 268 (9th Cir. 1997). Specifically, Defendant Chatham County admitted (*See* Exhibit A, No. 13) *Continental Ins. Co., subrogated to rights of Dennis K. Rings v. Chatham County, USDC, Southern District of Georgia, Savannah Division, Civil Action No. 403-038, In re Herb Goetz & Marlen Horn Associates, Inc.,* 120 F.3d 268 (9th Cir. 1997), that any judgment entered against Chatham County, in the instant case, would not be satisfied by funds received from:

a) the State of Georgia as part of general revenue funds provided to Chatham County;

b) the State of Georgia as part of funds which are directly earmarked for the payment of a judgment against Chatham County in this litigation;

c) the State of Georgia as part of funds that are earmarked for the payment of judgments in general.

Furthermore, Respondent Chatham County has admitted that the money Chatham County spent on maintenance of, and repairs to, the Causton Bluff Bridge from 1995 to the present was not allocated from funds Chatham County received from the State of Georgia. *Continental Ins. Co., subrogated to rights of Dennis K. Rings v. Chatham County, USDC, Southern District of Georgia, Savannah Division, Civil Action No. 403-038, Chandler v. United States*, 328 F.2d 906. Defendant Chatham County has also admitted that no funds were received by Chatham County from the State of Georgia that were designated by the State of Georgia for the operation, maintenance or repair of the Causton Bluff Bridge. *Continental Ins. Co., subrogated to rights of Dennis K. Rings v. Chatham County, USDC, Southern District of Georgia, Savannah Division, Civil Action No. 403-038, Chandler v. United States*, 328 F.2d 906.

The other two factors of the *Hines/Vierling* test "are mixed but tend to weigh towards a finding of no immunity" just as they did in *Hines* when no sovereign immunity was found even though the Ports Authority was "performing an essential governmental function."

When the status of Chatham County in the construction, maintenance and operation of the Causton Bluff Bridge is compared to the Eleventh Circuit's analysis of the status of Broward County, Florida with regard to its operation of Port Everglades in *Vierling*, or the Georgia Supreme Court's analysis in *Hines* of the Georgia Ports Authority, many of the same considerations are found to exist that caused the two port agencies to be denied the status of "arms of the state." Specifically, the Port Everglades Authority, a department of Broward County was found to have the following characteristics:

Florida law gives counties an independent status in operating port facilities. For example, (1) Florida law provides counties with the authority to own, operate, and manage port facilities, and the authorization to charge fees for use of a port facility, Fla. Stat. ch. 125.012; (2) Florida law authorizes counties to issue bonds for the purpose of paying for all or part of the cost of operating the port facilities, Fla. Stat. Ch. 125.013, 125.015; and (3) Florida law permits county commissioners to sue or be sued in their operation of a port facility, Fla. Stat. Ch. 125.15. Each of these statutory provisions indicates that the Port Authority is independent of the State of Florida. *See Moor v. Alameda County*, 411 U.S. 693, 719-20, 93 S. Ct. 1785, 1800-01, 36 L. Ed. 2d 596 (1973).

339 F.3d at 1314 n.15.

The *Hines* Court actually determined that greater control by the State existed at the Georgia Ports Authority; although still insufficient to outweigh the primary consideration of who was ultimately responsible for paying an adverse decision were the litigation to continue. Because Chatham County has less oversight and responsibility to the State of Georgia, Chatham County cannot and should not be found to be an "arm of the state." (*Hines v. Georgia Ports Authority, supra, at page 94)*

The Official Code of Georgia § 36-1-1 lists the names of the 156 counties in the State of Georgia; however, it does not provide a definition of the counties' powers or status. The general powers and duties of the counties are contained

in O.C.G.A. § 32-4-41. This grant of power includes authority for the planning, designating, improving, managing, controlling, and constructing an adequate county road system including the designation that the county shall have control of and responsibility for all construction, maintenance, or other work related to the county road system. Though O.C.G.A. § 32-4-41 does not specifically address bridges, O.C.G.A. § 48-5-220(4) specifically authorizes counties to collect taxes for the purposes of building and repairing public buildings and bridges. Thus, these three statutes read together, define Chatham County's responsibility for maintaining roads within its borders, and specifically authorizes Chatham County to collect taxes for the purpose of maintaining the Causton Bluff Bridge.

In conjunction with the duty to maintain bridges and the right to raise the necessary funds to maintain bridges, O.C.G.A. § 32-4-70(b) provides specific authorization for Chatham County, and other counties, to enter into contracts with third parties for the repair of bridges located within its borders. Furthermore, the language of O.C.G.A. § 32-4-70(b) does not require or even suggest that these contracts are subject to review by the state government. The United States Supreme Court has long held that an unrestricted and unsupervised right to contract, such as that granted to Chatham County by the State of Georgia, is sufficient to deny a county's entitlement to sovereign immunity under the Eleventh Amendment. *See Lincoln County v. Luning,* 133 U.S. 529, 33 L. Ed. 766, 10 S. Ct. 363 (1890). (Another decision of the U.S. Supreme Court in conflict with the rulings of the trial and appellate courts in the instant case).

Chatham County's right to enter into contracts is significant; however, it represents only half of the State of

Georgia's definition of a county's powers and liabilities relative to the bridges within its borders. The State of Georgia has statutorily recognized that if Chatham County has a duty to repair and maintain the roads and bridges within the county and the necessary authority to carry out that duty, then the county must also bear the liability for any injury which results from such repairs. The liability is clearly set forth in O.C.G.A. § 32-4-71(b):

> If the condition of bridge repair authorized by Code Section 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county or counties, provided that the county shall be discharged from all liability upon the inclusion in the performance bond of the aforesaid bridge repair condition.

The clear import of the statute is that if a county hires a third-party to satisfy its duties to maintain a bridge, the county may enter into an agreement with that party to provide indemnification of the county's liability. However, the foundation of this authorization to enter into an indemnification agreement is that the county initially bears the "primary liability for all injuries caused by reason of a defective bridge for damage occurring within seven years" of work on the bridge. The statute does not even require that the repairs be the reason for the injury, only that the injury is caused by a defective bridge.

Therefore, since the law of the State of Georgia provides Chatham County with the independent authority to build the bridge, the duty to maintain the bridge once built, autonomy from state supervision and financing in the performance of that duty, and establishes that Chatham County is primarily liable for any damages which result from its operation of a defective bridge the State has thereby given its consent to be sued and therefore it is not entitled to sovereign immunity. The contrary rulings in the instant case created a conflict with Georgia law and should be reversed.

Chatham County is not entitled to sovereign immunity because the damages inflicted on the Plaintiffs were caused by the negligence performance of ministerial acts and the creation of a continuing nuisance.

Chatham County is not protected by sovereign immunity because it created a continuing nuisance and the act of repairing and maintaining the bridge is a ministerial act. In the instant case the repair and maintenance of the draw bridge relates solely to the physical execution of the work.

> When (the county) engaging in the work of opening, closing . . . or repairing (a street, or building a sewer) and is thus engaged in the physical execution of the work, it is evidently in the discharge of duties purely of a ministerial nature. It follows that the actual progress of such work by a county is of a ministerial character, and that the duties of a (road) supervisor in carrying out the physical details of the work are likewise ministerial in nature.

Joyce v. Van Arsdale, 196 Ga. App. 95, 97, 395 S.E.2d 275. Further, the *Joyce* Court stated, the removal of the (tree across

the county road) was the performance of a ministerial duty, not a discretionary one, regardless of the elements of "discretion" that may be present during the execution of the mandatory job. "(T)he execution of a specific task is characterized as ministerial even though the manner in manner in which it is accomplished is left to the employee's discretion." *Joyce v. Van Arsdale,* 196 Ga. App. 95, 97, 395 S.E.2d 275 citing *Miree v. United States,* 490 F. Supp. 768, 773-4 (N.D. Ga. 1980). Similarly, no official immunity is provided for ministerial acts negligently performed or for discretionary acts performed with actual malice or an intent to injure. *Crisp County School Sys. v. Brown,* 226 Ga. App. 800, 802(2), 487 S.E.2d 512. The question of whether a duty is ministerial or discretionary turns on the character of the specific act, not the general nature of the official's position. *Vertner v. Gerber,* 198 Ga. App. 645, 646, 402 S.E.2d 315. A ministerial act is defined as being one that is "simple, absolute and definite arising under conditions admitted or proved to exist and requiring merely the execution of a specific duty." *Stone v. Taylor,* 233 Ga. App. 886, 888(2), 506 S.E.2d 161. Further, "while the act of establishing a policy in the first place is discretionary, the acts of following established policies of inspecting and monitoring are ministerial tasks. *Woodard v. Laurens Co.,* 265 Ga. 404, 407(2), 456 S.E.2d 58.

The Georgia Court of Appeals in *Brannan v. City of Brunswick,* 49 Ga. App. 62, 174 S.E. 186 in dicta stated, ". . . We are convinced that the operation of the bridge by the municipality was a ministerial function." Under this rule and the allegations of the petition we are convinced that the operation of the bridge by the municipality was a ministerial function. We at the same time bear in mind the decision of *Watson v. City of Atlanta,* (267 Ga. 185, 475 SE 2d 896)

. . . , where it was held that the operation of a hospital by a municipality having authority to so operate is a governmental function, and the mere fact that the petition alleged that "in the maintenance of said Grady Hospital the city of Atlanta charged fees for patients entering therein" would not change "its character as a public institution and one operated by the municipal corporation in the performance of its governmental duties"; also the decision in *Cornelisen v. Atlanta* (146 Ga. 416, 915 SE 415), . . ., in which it was held that "it would not affect the public character of the duties of the officers, agent, or servants of the city that a purely incidental profit might result to the city from its operation or management of the park." These decisions in no way conflict with what we have said with reference to the maintenance and operation of the toll bridge in this case; instead, they might be cited as authority for this proposition. *Brannen v. City of Brunswick,* 49 Ga. App. 62, 174 S.E. 186, 190. Therefore, based on the authority of the Georgia Constitution, Article 1, Section 2, Paragraph 9(d), the exemption from sovereign immunity set out in that paragraph precludes the defense of sovereign immunity for the County because the damage was caused by a county employee's negligent performance of ministerial acts. Thus, the ruling of the trial and appellate courts in the instant case conflict with the rulings of the Georgia Appellate Court.

Likewise the Courts in their decisions in this case ignored the evidence of the numerous times the bridge collapsed and damaged vessels traversing under it thus creating a continuing nuisance. In *City of Bowman v. Gunnells*, 243 Ga. 809, 256 S.E.2d 782 (1979), the Georgia Supreme Court set out three guidelines to define a nuisance for which a city may be held liable. First, the defect or degree of misfeasance must be to such a degree as would exceed the concept of mere

negligence, second, the act must be of some duration, and third, the city must have failed to act within a reasonable time after knowledge of the defect or dangerous condition. *Rainey v. City of East Point*, 173 Ga. App. 893, 894, 328 S.E.2d 567 (1985). (*Few v. City of Eatonton*, 189 Ga. App. 687, 377 S.E.2d 504 (1988)) Therefore, the ruling of this Court should be reversed because it refused to recognize Georgia law excluding the creation of continuing nuisances such as improper maintenance or repair to the bridge from sovereign immunity thereby creating another conflict between the rulings in the trial and appellate courts in the instant case and the rulings of the Georgia Appellate Court.

The District Court's reliance on *Gilbert v. Richardson* (264 Ga. 744, 452 S.E.2d 476) and *Federal Maritime Commission v. South Carolina State Port Authority* (535 U.S. 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2(d) 962) *as affirmed by the Eleventh Circuit is misplaced as the bases of those rulings render them inapplicable to the constitutional provisions, both Federal and State applicable to the facts of this case*)

It is significant that in the District Court's ruling affirmed by the Eleventh Circuit, it held in favor of the Defendant who asserted its immunity was based on "residual sovereign immunity" that arises from common law. (Opinion p.10). That Court cited *Gilbert v. Richardson* 264 Ga. 744, 745-46 (1994) and *Federal Maritime Commission v. S. C. State Ports Authority*, 535 US 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2d 962. (USDC Order, p. 6) In *Gilbert v. Richardson*, the Georgia Supreme Court, discussed why sovereign immunity applied to the County and referred to the 1991 Constitutional Amendment, Article 1, Section 2, Paragraph IX (e), which stated, ". . . The Sovereign Immunity of the State and its

Departments can only be waived by an act of the general assembly which specifically provides sovereign immunity is thereby waived and the extent of such waiver." Citing Georgia Constitution, Article 1, Section 2, Paragraph 9(e). The same Georgia Supreme Court which ruled against sovereign immunity for a state agency in favor of prevalence of maritime law in the *Gilbert* opinion ignored Article 1, Section 2, Paragraph 9(d), which states,

> . . . all officers and employees of the State or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of or negligent failure to perform, the **ministerial** (emphasis ours) functions and may be liable for injuries and damages if they act with actual malice, all with actual intent to cause injury in the performance of their official functions. . . .

The provisions of this subparagraph shall not be waived. Georgia Constitution, Article 1, Section 2, Par. 9(d).

The Petitioners in this case have argued in their Brief and submit that operating a bridge was a ministerial function and this presentation was ignored by the trial Court and the Appellant Court. This argument cries out to be heard at this time and it should be considered. This argument also applies to this Court's ruling that it should distinguish and not apply the Court's application of *Federal Maritime Commission v. S. C. State Ports Authority* (535 U.S. 743, 753, 122 S. Ct. 1864 152 L. Ed. 2d 962.) In the majority opinion in the *South Carolina State Ports Authority* case a statement of Alexander Hamilton was quoted,

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state of the union. Unless, therefore, there is a surrender of this immunity and the plan of the convention will remain with the states. . . .

Federal Maritime Commission, South Carolina State Ports Authority, (535 U.S. 743, 753, 122 S. Ct. 1864 152 L. Ed. 2d 962.). There was a surrender of sovereign immunity for acts of a ministerial nature negligently performed on the Georgia Constitution , Article 1, Section 2, Paragraph 9(d). Moreover and most important, the entire S. C. State Ports Authority opinion dealt with the Eleventh Amendment immunity and residual common-law sovereign immunity was not mentioned in the entire 21-page opinion.

The extraordinary reliance on the trial court's misstatements of law and fact as it ignored the numerous cases decided by the U.S. Supreme Court which held state and local governmental authorities responsible for creating hazards to navigation has been so flagrant that summary reversal by this Court is demanded.

In *Conklin v. Norwalk* (1920, CA2 Conn) 20 F. 68, in which a malfunction of gates intended to keep traffic off a bridge when the draw was open delayed raising the draw, and consequently the bridge operator was held liable for the resulting collision on the basis of the operator's failure to provide a warning signal to the approaching vessel.

A company that supplied power to a drawbridge was held to be properly impleaded in a claim for damages by a tugboat owner liable for a collision which resulted from failure of the bridge to open in *Eureka Towing Line, Inc. v. New York* (1922, DC NY) 283 F. 858, finding that a defect in the company's power transmission system fused the bridge's lift rails, preventing it from opening. The court cited *Clement v. Metropolitan West Side El. R. Co.* (1903, CA7 Ill) 123 F. 271, for the proposition that one maintaining a drawbridge over navigable waters is bound to use reasonable care not to impede vessels, and held the proposition applicable to a company. No ruling was made dismissing New York on the grounds of sovereign immunity.

Where a towed schooner was struck and damaged by the draw of a municipal swing bridge that went out of control and over-swung, and the court found that a locking mechanism that would have prevented the over-swing had been out of order for some time, it held the city liable for the damage in *Etheridge v. Philadelphia* (1885, DC Pa.) 26 F. 43. Noting that the defect should have been discovered in the exercise of proper vigilance, and that the city had in fact been notified of it long before the accident, the court held that it was the city's duty to keep the bridge in proper repair, and that the accident had resulted from its failure to discharge that duty.

In *The Majestic* (80 F.2d 879, 1936, CA4 VA), a mechanical problem prevented the opening of a bridge in response to a vessel's signal, and the bridge tender was held liable for failure of the bridge tender to give a prompt warning signal. The bridge was owned and opened by the United States. *The Majestic* (80 F.2d 879, 1936, CA4 VA)

In *Miami v. Western Shipping & Trading Co.* (1956, CA5 Fla.) 232 F.2d 847, the court held a city liable for damage incurred by a ship being towed through a municipal bascule bridge when a braking mechanism failed, permitting one leaf of the bridge to fall on the ship. In affirming the trial court's decision holding the city liable the court noted that testimony of the city's employees established that a similar failure had occurred 3 days previously, that the bridge tender on duty at the time of the accident had been told upon starting his shift that something was wrong with the braking mechanism, and that a repair crew working on the bridge at the time of the accident had observed the braking mechanism malfunction shortly before the accident. Given these facts, the court held the city was clearly negligent in lifting the bridge and signaling the ship to proceed under it.

A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. In this case the bridge tender was also held liable. (*City of Chicago v. Mullen*, 116 F. 292, 54 C.C.A. 94). Likewise, there was no exemption on the grounds of sovereign immunity.

CONCLUSION

Based upon the arguments asserted herein involving the mandate of the principles of uniformity in federal maritime law and that state legislated immunity has no application in federal maritime tort claims, the County employees were performing a ministerial function and the County created a continuing nuisance for which there is no sovereign immunity and the ruling of the Georgia Supreme Court in *Hines v. Georgia Ports Authority et al.* which held that "federal admiralty law governs claims sounding in admiralty, regardless of whether the claim is brought in state or federal court and that state-conferred immunity is preempted by admiralty law, we submit that for all of the foregoing reasons Certiorari should be granted and the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit should be subject for review by this Honorable Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 28, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-13308
Non-Argument Calendar

D. C. Docket No. 03-00099-CV-4

ZURICH INSURANCE COMPANY, subrogated to the rights of James K. Ludwig, Jr. & Carol C. Ludwig,

Plaintiff-Appellant,

versus

CHATHAM COUNTY, GA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

(JANUARY 28, 2005)

Before BLACK, PRYOR and FAY; Circuit Judges.

Appendix A

PER CURIAM:

This case presents the question of whether or not a Georgia county can be held liable in admiralty for a maritime tort. The district court granted summary judgment to Defendant Chatham County, Georgia, ruling that it was an arm of the State of Georgia, and entitled to sovereign immunity. Moreover, the district court found that Chatham County did not waive its sovereign immunity. Plaintiffs, Zurich Insurance Company, James K. Ludwig, Jr., and Carol Ludwig appealed. We agree that Chatham County is entitled to invoke sovereign immunity, and therefore affirm the district court's grant of summary judgment to the Defendant.

Chatham County owns, operates, and maintains the Causton Bluff Bridge, a drawbridge over the Wilmington River in Georgia, which is part of the Intercoastal Waterway. On October 6, 2002; James K. Ludwig sailed his vessel on the Intercoastal Waterway, approaching the Causton Bluff Bridge. Mr. Ludwig contacted the bridge operator and requested that the bridge be raised, to allow his vessel to pass underneath. The bridge tender then raised the spans, but the Northwest span of the bridge drifted down; striking Mr. Ludwig's vessel: The damage to the boat amounted to $137,987.67. Mr. Ludwig and his wife, Carol, and their insurer, Zurich Insurance Company, sued Chatham County to recover their expenses. Both Chatham County and the Plaintiffs moved for summary judgment. The district court granted summary judgment to Chatham County, holding that the County enjoyed sovereign immunity because by acquiring land, constructing, and operating the bridge, the County

Appendix A

exercised state powers. Additionally, because the County had no immunity-waiving insurance, the Plaintiffs could not demonstrate that the county waived that sovereign immunity.

We review a district court's grant of summary judgment *de novo*, applying the same legal standards used by the district court. *O'Ferrell v. United States*, 253 F.3d 1257, 1265 (11th Cir. .2001). Summary judgment is proper where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We construe the evidence in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-movant. *See Burton v. City of Belle Glade,* 178 F.3d 1175,1187 (11th Cir. 1999).

At issue in this case is the Plaintiffs' ability to sue Chatham County. It is clear that the State of Georgia itself cannot be sued under maritime law based on Eleventh Amendment sovereign immunity. *See Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002). The same immunity, however, does not extend to counties.[1] Rather; common law has carved out a "residual immunity," which would protect a political subdivision such as Chatham County from suit. *See Gilbert v. Richardson*, 452 S.E.2d 476, 478

1. Chatham County is not asserting an Eleventh Amendment. immunity defense, which would be inapposite to our holding in *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309 (11th Cir. 2003). In *Vierling*, we explained that the Broward County Port Authority was not an arm of the state for Eleventh Amendment purposes because Florida law treated it solely as an entity of the county. Florida had no control over the operation of the port facilities, and Port Authority was an unfunded, independent, and self-sufficient enterprise.

(Ga.. 1994); *Fed. Maritime Comm'n*; 535 U.S. at 753 ("the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular, exemplification of that immunity").

In *Broward County, Fla. v. Wickman*, the former Fifth Circuit determined, in a substantially similar case where the plaintiff s yacht struck an underwater abutment attached to a county-owned bridge, that "a state and its political subdivisions are immune from process in actions of this character, even in admiralty." 195 F.2d 614, 615 (5th Cir. 1952).[2] *Wickman* explained that because the county owned the bridge and used power delegated by the state to operate the bridge, then the county enjoyed sovereign immunity from a suit in admiralty. *Id.*

The *Wickman* court took care to distinguish itself from *Workman v. City of New York*, 179 U.S. 552 (1900), a case primarily relied upon by the Plaintiffs here, where the Supreme Court addressed the substantive law of admiralty, and wrote that local law could not preempt federal admiralty law in order to exempt the City of New York from process. As substantive law was not the issue in *Wickman*, the Fifth Circuit drew a parallel to another Supreme Court decision, *Ex Parte State of New York*, 256 U.S. 490 (1921), which as part of procedural law, found that sovereign immunity principles prevented a court from exercising jurisdiction over the defendant. 256 U.S. at 500. Although our binding

2. In *Bonner v: City of Prichard* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

precedent is far from recent, the same principle holds true today: "the immunity of a state from a suit in personam in the admiralty brought by a private person without its consent is clear." *J. Ray McDermott & Co., Inc. v. Dept. of High., State of La.*, 267 F.3d 317 (quoting *New York,* 256 U.S. at 500).

We note, however, that when a city, county, or other municipal entity is not exercising power delegated from the state, it cannot be sheltered by sovereign immunity. *Wickman*, 195 F.2d at 615. Therefore, we turn to a decision of this Court in a nearly identical case involving the same bridge, the same county and the same tort. We affirmed, without opinion, the case of *Continental Ins. Co. v. Chatham County. Ga.*, Case No. 04-106610F (11th Cir. 1/14/2004). In *Continental*, the district court granted summary judgment to Chatham County on grounds of sovereign immunity, and explained that the first line of inquiry should be whether the entity could be deemed a part of the State, because only then may it invoke residual sovereign immunity. In addressing that question, the trial court found Chatham County to be an arm of the State of Georgia because it exercised state power by "acquiring the land and constructing/operating the public highway and bridge in question." *See e.g.*, O.C.G.A. § 32-4-92 (enumerating state's delegation of its powers to county with respect to the operations of a county road system); O.C.G.A. § § 32-4-70, 32-4-71 (governing county authority to contract for the construction and maintenance of bridges). Moreover, this Court has held that "sovereign immunity extends to counties, as subdivisions of the state." *Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir. 1993).

Appendix A

The district court in the instant case adopted much of *Continental's* reasoning, and we agree, as we did in affirming *Continental.* This case is no different, and, despite Plaintiffs' insistence, the "mere act" of maintaining and operating bridges and roads does not waive a county's sovereign immunity. In *Continental*, the district court noted Chatham County's lack of immunity-waiving insurance as evidence of non-waiver. Chatham County's insurance policies have not changed since. Additionally, we previously have found that "the State of Georgia is immune to suit for any cause of action unless sovereign immunity is expressly waived by constitutional provision or statute." *Kitchen*, 6 F.3d at 731. Chatham County has not so expressly waived its sovereign immunity. Thus, because Chatham County is not attempting to exempt itself from a suit in admiralty via local law, *see Workman*, nor has it waived sovereign immunity, we AFFIRM the district court's grant of summary judgment for the Defendant Chatham County.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA FILED JUNE 23, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

Case No.: CV403-99

ZURICH INSURANCE COMPANY,

Plaintiff,

vs.

CHATHAM COUNTY, GEORGIA,

Defendant.

ORDER

Before the Court is Defendant's Motion for Summary Judgment (Doc. 10), Plaintiff's Motion for Summary Judgment (Doc. 16), and Plaintiff's Motion to Strike (Doc. 14). After careful consideration, the Court **GRANTS** Defendant's motion for summary judgment and **DENIES** Plaintiff's motion for summary judgment and motion to strike.

BACKGROUND

This case arises out of an accident that occurred on October 6, 2002, when James K. Ludwig attempted to transverse the Causton Bluff Bridge ("Bridge"). The Bridge

is a drawbridge that is owned, operated and maintained by Chatham County, Georgia. It is permanently connected to the Islands Expressway, a public road maintained by Chatham County, which connects the City of Savannah with Whitemarsh, Wilmington, and Tybee Islands.

The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half of the span. The Bridge permits passage of light pleasure craft, tug and tow vessels, and commercial vessels over the water of the intercoastal waterway of the Wilmington River. The County employs bridge tenders to open the Bridge for that purpose.

On October 6, 2002, Ludwig was in his vessel, "the Love of My Life," ("the Vessel") which is insured by Plaintiff Zurich Insurance Company. As he approached the Bridge, Ludwig contacted the bridge tender and requested that the Bridge be raised to permit his transit. At that time, the bridge tender opened the Bridge, pursuant to Ludwig's request, but soon noticed that, the northwest span of the Bridge was drifting down. Immediately, the bridge tender attempted to make radio contact with Ludwig to warn him of the Bridge's disfunction, but Ludwig had turned off his radio before entering the Bridge operational area. The Bridge tender stopped the span of the Bridge that was drifting down and started to raise it back up. However, the Vessel hit that span, then deviated to the southwest, striking the Bridge. As a result

of the accident, $78,980.50 worth of damage was incurred on the Vessel. Plaintiff incurred additional expenses, all totaling $137,987.69.

On June 2, 2003, Plaintiff filed its Complaint in this Court asserting three counts: (1) negligence, (2) maintenance of a continuing nuisance, and (3) statutory and/or regulatory fault for violation of the navigable servitude encompassed by the U.S. Coast Guard and U.S. Corps of Engineers Permits. On November 24, 2003, Defendant filed the motion for summary judgment now before the Court, claiming that Plaintiff's claims are barred by the doctrine of sovereign immunity. On December 16, 2003, Plaintiff filed its response to Defendant's motion, as well as its own cross motion for summary judgment. Defendant filed a response to Plaintiff's motion on December 29, 2003.

Plaintiff filed its-motion to strike on December 16, 2003, seeking to strike the affidavit of Robert Drewry contained in Defendant's Motion for Summary Judgment. Defendant filed its response on December *29*, 2003.

ANALYSIS

I. Standard of Review

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56 (c). The "purpose of summary, judgment

is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348,. 1356, 89 L. Ed. 2d 538 (1986) (quoting Fed. R. Civ. P. 56 advisory committee's note). Summary judgment is appropriate when the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Tidmore Oil Co. v. BP Oil Co. /Gulf Prods. Div., a Div. of BP. Oil Co.*, 932 F.2d 1384, 1387-88 (11th Cir. 1991). The substantive law governing the action determines whether an element is essential. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *DeLong Equip. Co. v. Washington Mill Abrasive Co*, 887 F.2d 1499, 1505 (11th Cir. 1989).

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, if any, which it believes demonstratc the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. The burden then shifts to the nonmovant to establish, by going beyond the pleadings, that there is a genuine issue as to facts material to the nonmovant's case. *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1583 n.16 (11th Cir. 1991); *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991). A dispute of material fact "is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict

for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248, 106 S. Ct. at 2510. However, if the nonmoving party's response to the, summary judgment motion consists of nothing more than mere conclusory allegations, then the court must enter summary judgment in the moving party's favor. *Pepper v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, [then] there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356; *see also Liberty Lobby*, 477 U.S. at 252, 106 S. Ct. at 2512; *Johns v. Jarrard*, 927 F.2d 551, 556 (11th Cir. 1991).

In assessing whether the movant is entitled to summary judgment in its favor, the district court must review the evidence and all reasonable factual inferences arising from it in the light most favorable to the nonmoving party. *Welch v. Celotex Corp.*, 551 F.2d 1235, 1237 (11th Cir. 1992); *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991). The Court must avoid weighing conflicting evidence. *Liberty Lobby*, 477 U.S. at 255, 106 S. Ct. at 2513; *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 934 (11th Cir. 1987). A mere "scintilla" of evidence supporting the opposing party's position, however, will not suffice. *See, e.g., Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). Nevertheless, where a reasonable fact finder may "draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment." *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989) (citation omitted). In light of this standard, the Court will now address the parties' arguments for summary judgment.

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II. *Defendant's Motion for Summary Judgment*

Defendant contends that summary judgment should be granted in its favor on Plaintiff's claims because it is entitled to sovereign immunity. The Eleventh Circuit Court of Appeals recently held in *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1313-15 (11th Cir. 2003), that a Florida county is not entitled to a defense of immunity based on Eleventh Amendment-Sovereign immunity.[1] However, Defendant asserts as the source of its immunity, not the Eleventh Amendment, but a "residual sovereign immunity" that arises from common law. *See Gilbert v. Richardson*, 264 Ga. 744, 745-46 (1994); *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002).

The Eleventh Amendment is a Congressional response to the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. 419 (1793), which held that "Article III of the Constitution authorized citizens of one State to sue another State in federal court." *Fed. Maritime*, 535 U.S. at 752, 122

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1. The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

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S. Ct. at 1870. The adoption of the Eleventh Amendment effectively overturned *Chisolm*'s holding. However,

> [i]nstead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to 'address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the Chisholm decision.' As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity.

Id. at 753, 122, S. Ct. at 1871 (quoting *Alden v. Maine*, 527 U.S. 706, 723, 119 S. Ct.. 2240, 144 L. Ed. 2d 636 (1999)) (citing *Blatchford v. Native. Village of Noatak*, 501 U.S. 775, 779, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991)).

This case does not involve a state, but rather a county. If Plaintiff were attempting to sue the State of Georgia, the question of the state's sovereign immunity would be clear. *See Fed. Maritime*, 535 U.S. at 760, 122 S. Ct. at 1875 (holding that, a state cannot be subject to suit in the Federal Maritime Commission because of its substantial similarity to an Article III Court). The pertinent issue before the Court then is whether the County is entitled to the same immunity as the state.

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According to-Defendant, it is entitled to the protection of sovereign immunity because it is a political subdivision of the State of Georgia. In support of its argument, Defendant cites *Broward County, Fla. v. Wickman*, 195 F.2d 614 (5th Cir. 1952),[2] which, involved a suit, in admiralty for damages resulting from an accident in which a yacht struck an underwater projection that was part of the abutment of a county-owned drawbridge. In that case, the Fifth Circuit held that the county, as a political subdivision of the state, was immune from suit.

In support of its holding, the Fifth Circuit relied on two cases, *Ex Parte State of New York*, 256 U.S. 490, 500 (1921), and *Workman v. City of New York* 179 U.S. 552, 570 (1900), and concluded that a Florida county that owned and operated a public bridge using power delegated to it from the state enjoyed sovereign immunity from admiralty process, the functional equivalent of being immune from an admiralty suit altogether. *Wickman*, 195 F.2d at 615. In *Wickman*, the circuit court based its decision not on the immunity provided by the Eleventh Amendment, but on the state's residual sovereign immunity. *Cont'l Ins. Co. v. Chatham County*, No. CV403-38 (S.D. Ga. Jan. 14, 2004) (order granting summary judgment). When a city or other municipal entity is not exercising power delegated from the state, however, the *Wickman* court acknowledged that sovereign immunity would not be available. *Wickman*, 195 F.2d at 615.

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2. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Appendix B

The issue then becomes whether, in this case, the County may be deemed part of the state, either by having exercised power delegated from the state, or because it is a political subdivision of the state. If the County is deemed part of the state, then it may invoke residual sovereign immunity. *See Principe Compania Naviera, S.A. v. Bd. of Comm'rs of Port of New Orleans*, 333 F. Supp. 353, 354-56 (E.D. La. 1971) (recognizing residual sovereign immunity to protect a "sovereign or a party with sovereign attributes"); *J. Ray McDermott & Co. v. Dent of Highways, State of La.*, 267 F.2d 317 (5th. Cir. 1959) (affirming lower court's extension of sovereign immunity to a department of the state). However, if it is not deemed part of the state, then it is subject to this Court's jurisdiction and Plaintiff's claims may proceed.

To determine whether a governmental entity was acting as part of the State, courts typically examine whether it was exercising power delegated from the State or whether it was performing a proprietary function. *See, Michaeledes v. Golden Gate Bridge, Highway and Transp. Dist.*, 202 F. Supp. 2d 1109, 1111 (N.D. Cal. 2002) ("Lower courts are to determine a public entity's sovereignty 'not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.'") (citing *New York*, 256 U.S. at 500, 41 S. Ct. at 588; *Workman*, 179 U.S. at 570, 573-74, 21 S. Ct. at 212); *see also Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994) (identifying counties as departments or agencies of the state for state law immunity purposes). Plaintiff does not dispute that counties exercise state power to acquire land and build and operate bridges. *See* O.C.G.A. § 32-4-92

(preamble) (enumerating state's delegation of its powers to a county with respect to county road systems); *id.* at (3) (A) (counties may exercise the state's power to condemn land for roads); *id.* at (8) & (11) (county can exercise the state's power to tax for road-building/maintenance purposes); O.C.G.A. §§ 32-4-70 - 32-4-71 (governing county authority to construct, reconstruct and repair bridges, payment bonds for same).

By acquiring the land, constructing, and operating the bridge in question, the County was exercising these state powers. Merely building and operating roads and bridges does not waive its sovereign immunity. *Kordares v. Gwinnett County*, 220 Ga. App. 848, 849-50, 470 S.E.2d 479 (1996); *see also Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir. 1993) (noting that in the absence of waiver, Georgia's sovereign immunity extends to counties as subdivisions of the state). In fact, it is Plaintiff's burden to show a waiver. *Smith v. Chatham County*, 264 Ga. App. 566, 567-68, 591 S.E.2d 388 (2003). In this case, the County has no immunity-waiving insurance, and Plaintiff has not otherwise shown that the County's sovereign immunity was waived. Accordingly, the Court finds that the County is protected by sovereign immunity. Defendant's motion for summary judgment is GRANTED.

CONCLUSION

Defendant's motion for summary judgment is **GRANTED** on sovereign immunity grounds. Plaintiff's claims are **DISMISSED WITH PREJUDICE**. The Clerk of Court is **DIRECTED** to **CLOSE** this case. Because summary judgment has been granted in Defendant's favor, Plaintiff's cross motion for summary judgment and motion to strike are **DENIED AS MOOT**.

SO ORDERED this 20th day of June, 2004.

s/ William T. Moore, Jr.
WILLIAM T. MOORE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MARCH 4, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-13308-DD

ZURICH INSURANCE COMPANY, subrogated to the rights of James K. Ludwig, Jr. & Carol C. Ludwig,

Plaintiff-Appellant,

versus

CHATHAM COUNTY, GA,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: BLACK, PRYOR and FAY, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Zurich Insurance is DENIED.

ENTERED FOR THE COURT:

s/ Peter Fay
UNITED STATES CIRCUIT JUDGE

FILED
JUN 28 2005
OFFICE OF THE CLERK

(2)

No. 04-1618

IN THE

Supreme Court of the United States

ZURICH INSURANCE CO. subrogated to the rights of JAMES K. LUDWIG, JR. and CAROL C. LUDWIG,
Petitioners,

v.

CHATHAM COUNTY, GEORGIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Are there compelling reasons for granting a writ of certiorari when there is no conflicting decision on the issue of whether Chatham County as a political subdivision of the State of Georgia with power delegated by the State to operate, construct and maintain bridges, is entitled to "residual" sovereign immunity in this admiralty case?

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tenances incidental to the construction, maintenance, and enjoyment of such rights of way. . . :

(B) Bridges; . . ."

O.C.G.A. § 33-24-51 (b) states: "The sovereign immunity of local government entities for a loss arising out of claims for the negligent use of a covered motor vehicle is waived . . ."

O.C.G.A. § 36-85-1 (6) states: "'Group self-insurance fund' or "fund" means a pool of public moneys established by an interlocal risk management agency from contributions of its members in order to pool the risks of general liability, motor vehicle liability, property damage, or any combination of such risks."

O.C.G.A. § 32-4-71 (b) states:

"If the condition of bridge repair authorized by Code Section 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county or counties, provided that the county shall be discharged from all liability upon the inclusion in the performance bond of the aforesaid bridge repair condition."

O.C.G.A. § 32-4-70 (b) states:

"Where the contract relates to the construction or reconstruction of all or a part of a bridge, the county or counties affected may require the successful contractor to add to the conditions of the performance bond required under paragraph (1) of Code Section 32-4-69 the following condition: to keep the bridge in good condition for a period of not less than seven years."

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IN THE

Supreme Court of the United States

No. 04-1618

ZURICH INSURANCE CO. subrogated to the rights of
JAMES K. LUDWIG, JR. and CAROL C. LUDWIG,
Petitioners,

v.

CHATHAM COUNTY, GEORGIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS AND STATUTES

The Eleventh Amendment of the U.S. Constitution states:

> "The Judicial power to the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Georgia Constitution Article 9, § 2, ¶ 3 (a)(4) states:

> "In addition to and supplementary of all powers possessed by or conferred upon any county, municipality, or any combination thereof, any count, municipality, or any combination thereof may exercise the following powers and provide the following services: Street and road

construction and maintenance, including curbs, sidewalks, street lights, and devices to control the flow of traffic on streets and roads constructed by counties and municipalities or any combination thereof."

Georgia Constitution Article 1, § 2, ¶ 9 (e) provides:

"Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver."

O.C.G.A. § 32-3-1 (a) states:

"Any property may be acquired in fee simple or in any lesser interest, including scenic easements, airspace, and rights of access, by a state agency or a county or municipality through gift, devise, exchange, purchase, prescription, dedication, eminent domain, or any other manner provided by law for present or future public road or other transportation purposes."

O.C.G.A. § 32-3-1 (b) states: "Public road purposes shall include rights of way; detours; bridges; bridge approaches . . . ; and any and all other purposes which may be reasonably related to the development, growth, or enhancement of the public roads of Georgia."

O.C.G.A. § 32-4-42

O.C.G.A. § 32-1-3 (24)(B) states:

"Public road" means a highway, road, street, avenue, toll road, tollway, drive, detour, or other way open to the public and intended or used for its enjoyment and for the passage of vehicles in any county or municipality of Georgia, including but not limited to the following public rights, structures, sidewalks, facilities, and appur-

STATEMENT OF THE CASE

Causton Bluff Bridge ("Bridge") is a drawbridge which is owned, operated and maintained by Respondent Chatham County ("County"). (App. A, Aff. Drewry, ¶ 3) The Bridge is permanently connected to the roadway of Islands Expressway. (App. A, Aff. Drewry, ¶ 3) Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. (App. A, Aff. Drewry, ¶ 3, Exh. 1)

The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. (App. A, Aff. Drewry, ¶ 4) The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half of the span. (App. A, Aff. Drewry, ¶ 4) The Bridge permits passage of light pleasure craft, tug and tow vessels and commercial vessels over the water of intercoastal waterway of the Wilmington River. (App. A, Aff. Drewry, ¶ 4) The County employs bridge tenders to open the bridge for that purpose. (App. A, Aff. Drewry, ¶ 4)

The County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. (App. A, Aff. Drewry, ¶ 5) There is no charge to anyone for crossing the Bridge. (App. A, Aff. Drewry, ¶ 5) Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. (App. A, Aff. Drewry, ¶ 5) The County derives no income from operating and maintaining the Bridge. (App. A, Aff. Drewry, ¶ 5)

The Bridge was constructed in 1963 when the Islands Expressway was constructed as a two-lane roadway. (App. A, Aff. Drewry, ¶ 7) In the 1980's, a second bridge was constructed when the Islands Expressway was widened to

become a four-lane roadway. (App. A, Aff. Drewry, ¶ 7) There has been no additional construction or reconstruction to the Bridge since the 1980's. (App. A, Aff. Drewry, ¶ 7)

On October 6, 2002, James K. Ludwig was traveling in his vessel, the Love of My Life, on the intercoastal waterway of the Wilmington River. On that date, Mr. Ludwig contacted the bridge operator of the Bridge and requested that the Bridge be raised to permit his vessel to transit the waters beneath the Bridge. (App. B, Aff. Bowers, ¶ 4)

On October 6, 2002, the bridge tender opened the Bridge pursuant to Mr. Ludwig's request. (App. B, Aff. Bowers, ¶ 5) The bridge tender noticed that the northwest span of the bridge was drifting down and immediately tried to make radio contact with Captain Ludwig. (App. B, Aff. Bowers, ¶ 6) The bridge tender was unable to contact the vessel because the Captain turned off his radio prior to entering the Bridge operational area. (App. B, Aff. Bowers, ¶ 7)

The bridge tender stopped the span and started it back up; however, the Love of My Life hit the span. (App. B, Aff. Bowers, ¶ 8) The Love of My Life did not enter the channel of the Bridge, but deviated to the southwest, striking the Bridge. (App. B, Aff. Bowers, ¶ 9)

Petitioners filed suit in admiralty. After conducting discovery, the parties filed motions for summary judgment. The trial court granted the County's motion for summary judgment, holding that the County was entitled to residual common law sovereign immunity. (Petitioners' Appendix B) On July 1, 2004, Petitioners appealed. The Eleventh Circuit affirmed. (Petitioners' Appendix A)

On July 8, 2004, the Eleventh Circuit Court of Appeals ruled in favor of Respondent in a substantially identical unpublished opinion, set forth in Appendix C, *Continental Ins. Co. v. Chatham County, Georgia*, Case No. 04-10661-F.

The Court of Appeals adopted the trial court's analysis of "common law" sovereign immunity versus Eleventh Amendment sovereign immunity, as set forth in Appendix D.

REASON FOR DENYING THE WRIT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO COMPELLING REASONS FOR GRANTING A WRIT OF CERTIORARI WHEN THERE IS NO CONFLICTING DECISION ON THE ISSUE OF WHETHER CHATHAM COUNTY AS A POLITICAL SUBDIVISION OF THE STATE OF GEORGIA WITH POWER DELEGATED BY THE STATE TO OPERATE, CONSTRUCT AND MAINTAIN BRIDGES, IS ENTITLED TO "RESIDUAL" SOVEREIGN IMMUNITY IN THIS ADMIRALTY CASE

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10. There is no split in any of the circuits regarding common law sovereign immunity. There is no conflict between state courts of last resort or between the Georgia Supreme Court and any U.S. Court of Appeals regarding common law sovereign immunity. There is no conflict between a state court or the U.S. Court of Appeals and this Court regarding common law sovereign immunity. Rule 10 (a)-(c). Petitioner is simply trying to convert this case into an Eleventh Amendment case or a state law nuisance case to avoid the County's entitlement to long-standing common law residual sovereign immunity.

The County's sovereign immunity derives from the common law which pre-dates Eleventh Amendment immunity. The County is not asserting Eleventh Amendment immunity. The common law doctrine of sovereign immunity, adopted by

the State of Georgia in 1784, protected governments *at all levels* from unconsented-to legal actions. *Gilbert v. Richardson*, 264 Ga. 744, 745-746, 452 S.E. 2d 476, 477-478 (1994).

In *Chisholm v. Georgia*, 2 Dall. 419 (1793), the U.S. Supreme Court held that Article III of the Constitution authorized citizens of one state to sue another state in federal court. "The decision fell upon the country with a profound shock." *Alden v. Maine*, 527 U.S. 706, 720 (1999). As a result, Congress passed the Eleventh Amendment and the states quickly ratified it. *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 752 (2002). In passing the Eleventh Amendment, Congress only addressed the "specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision." *Id.* at 753.

Common law sovereign immunity does not derive from and is not limited by the Eleventh Amendment. *Alden, supra*, at 713. States have been afforded sovereign immunity before and after the adoption of the Eleventh Amendment. *Id.* Referring to a state's immunity from suit as "Eleventh Amendment immunity" is a misnomer. *Id.* The adoption of the Eleventh Amendment was not intended to limit sovereign immunity to the "narrow text of the Eleventh Amendment. . . ." *Id.* at 723-724. "[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Federal Maritime Commission, supra*.

The County acknowledges that Eleventh Amendment immunity does not extend to counties. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). The County also acknowledges that the Court in *Alden* stated that sovereign immunity does not extend to lesser entities which are *not* arms of the state. *Alden, supra*, at 756-757.

The County is an arm of the state and is entitled to sovereign immunity under the universal rule of state immunity from suit without its consent. *Broward County, Florida v. Wickman*, 195 F. 2d 614, 615 (5th Cir. 1952)[1]. In *Wickman*, a federal admiralty case, a yacht was damaged after striking an underwater projection that was part of the abutment of a drawbridge owned and operated by Broward County. Suit was brought in personam in admiralty against Broward County. *Id.* Broward County asserted that as a political subdivision of the state it was entitled to immunity. *Id.* at 614-615. The Court held that Broward County as a political subdivision of Florida was immune from suit in admiralty. *Id.* at 615 (citing *Ex parte State of New York*, 256 U.S. 490 (1921)).

The Court in *Wickman* relied on state law, *Keggin v. County of Hillsborough*, 71 Fla. 356, 71 So. 372 (1916), to determine if Broward County was an arm of the state. *Wickman, supra*, at 615. The Court in *Wickman* noted that in *Keggin*, which addressed a county's liability for damage caused by a "defective bridge," the *Keggin* court held that the county is a political subdivision of the state, performs functions of a public nature, and is an agency through which many of the powers of the state are exercised. *Wickman, supra*, at 615. Additionally, it noted that the *Keggin* court held that the building of roads and bridges, and the maintenance thereof, are functions of the state because the state delegates these duties to the political subdivision which acts as an agent for the public at large. *Id.*

In operating and maintaining the Bridge, Chatham County is an arm of the State of Georgia. Chatham County is a political subdivision of the State of Georgia. *Holmes v.*

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[1] In *Bonner v. City of Prichard*, 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Chatham Area Transit Authority, 234 Ga. App. 42, 45, 505 S.E. 2d 225, 227 (1998); *Thomas v. Hospital Authority of Clarke County*, 264 Ga. 40, 41, 440 S.E. 2d 195, 196 (1994); *Wojcik v. State*, 260 Ga. 260, 262, 392 S.E. 2d 525, 527 (1990). The County has been delegated power by the State to operate, construct and maintain bridges. Georgia Constitution Article, 9, § 2, ¶ 3 (a)(4), authorizes counties to provide for street and road construction and maintenance. Counties are authorized to acquire property for public road purposes. O.C.G.A. § 32-3-1 (a). "Public road purposes" includes bridges. O.C.G.A. § 32-3-1 (b). O.C.G.A. § 32-4-42 sets forth the powers of counties regarding county road systems and refers to public roads. (App. E) The definition of "public road" includes bridges. O.C.G.A. § 32-1-3 (24)(B).

Chatham County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. (App. A, Aff. Drewry, ¶ 5) There is no charge to anyone for crossing the Bridge. (App. A, Aff. Drewry, ¶ 5) Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. (App. A, Aff. Drewry, ¶ 5) The County derives no income from operating and maintaining the Bridge. (App. A, Aff. Drewry, ¶ 5) The County acts as a State agent for the public at large by performing the state governmental function of operating and maintaining the Bridge pursuant to explicit authority delegated by the State. *See* O.C.G.A. § 32-3-1 (b) which refers to the development, growth, or enhancement of the public roads of *Georgia*.

The immunity afforded under *Wickman* is not based on principles of Eleventh Amendment immunity but is based on the universal rule of state immunity from suit without the state's consent. *Wickman, supra; Ex parte State of New York, supra*. Although the Eleventh Amendment explicitly applies to suits in law or equity and not admiralty, it has been construed as applying in admiralty. *Ex parte State of New*

York, supra, at 498. Likewise, the admiralty and maritime jurisdiction is not exempt from the fundamental rule that a state may not be sued without its consent. *Id.* at 497. The Eleventh Amendment "is but an exemplification of this fundamental rule." *Id.* The *Wickman* decision, which relies on this fundamental rule in applying sovereign immunity to counties, is cited in 134 ALR Fed[2] 537, § 2 (b) and 2 Am Jur 2d, Admiralty[3], § 51, as authority that the exemption of states from suits in admiralty applies to state subdivisions such as counties. The Court in *Wickman* had available to it the U.S. Supreme Court case of *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890), which stated that counties are not protected by the Eleventh Amendment from suit in federal court.

The Court in *Wickman* distinguished *Workman v. Mayor of the City of New York*, 179 U.S. 552 (1900), upon which Petitioners rely. The Court stated that *Workman* is inapposite because it addresses substantive admiralty law, not the Court's power to exercise jurisdiction over the person of the defendant. *Wickman, supra.* The *Wickman* court concluded that nothing in *Workman* overrules the view that "a state and its political subdivisions are immune from process in actions of this character, even in admiralty." *Id. See also J. Ray McDermott & Co. v. Department of Highways, State of Louisiana*, 267 F. 2d 317, 318 (5th Cir. 1959), cert. denied, 361 U.S. 914 (1959), which stated that *Wickman* has settled it for this circuit that the "immunity of a state from a suit in personam in the admiralty brought by a private person without its consent is clear."

Petitioners' reliance on *Vierling v. Celebrity Cruises, Inc.*, 339 F. 3d 1309 (11th Cir. 2003), is misplaced. The issue in *Vierling* is whether the Eleventh Amendment applies to the Port Authority of Broward County. *Id.* at 1313. The County

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[2] 134 ALR Fed was published in 1996.

[3] 2 Am Jur 2d, Admiralty, was published in 1994.

is not asserting sovereign immunity based on the Eleventh Amendment. (Petitioner's App. A, p. 3a, n. 1) Additionally, the Port Authority was performing proprietary functions in *Vierling*. *Id.* at 1314 n. 15.

The Court in *Vierling* did not effectively overrule *Wickman*. It simply stated that it was not persuaded that the Port Authority was an arm of the state under the reasoning of *Keggin, supra*, because the Port Authority was performing proprietary functions. *Vierling, supra*, 339 F. 3d at 1315, n. 15. It further stated that the decision of *Canaveral Port Authority v. Department of Revenue*, 690 So. 2d 1226, 1228 (Fla. 1996), cast doubt "on the extent to which counties performing proprietary functions—such as providing passenger loading services—are considered the state for purposes of immunity." *Id.*

Case law makes a distinction between the liability of counties and cities in admiralty cases because municipal corporations under local charters perform corporate functions in building and operating bridges, and counties exercise delegated state powers and governmental functions in the construction and maintenance of roads and bridges. *See Pelican Marine Carriers, Inc.*, 791 F. Supp. 845, 856 (M.D. Fla. 1992), aff'd without opinion, 4 F. 3d 999 (11th Cir. 1993), citing a line of cases addressing laws applicable to municipal corporations. *See also* 2 Am Jur 2d, Admiralty, § 51, and 134 ALR Fed 537, § 2 (b).

Petitioners' reliance on *Hines v. Georgia Ports Authority*, 278 Ga. 631 (2004), is without merit. The Court in *Hines* addressed whether the Georgia Ports Authority is entitled to Eleventh Amendment immunity for admiralty claims and concluded that it is not. *Id.* at 633, 637, 604 S.E. 2d at 192, 195. The Court in *Hines* did not address residual common law sovereign immunity. *Id.* at 633-637, 604 S.E. 2d at 192-195. It only addressed Eleventh Amendment immunity. *Id. See* Order of U.S. District Court, filed June 10, 2005, denying

Petitioners' motion for relief from judgment and addressing *Hines*. (App. F) *See also* Order of U.S. District Court, filed April 22, 2005, denying Plaintiffs' motion for relief from judgment in *Dennis K. Rings and Continental Insurance Company v. Chatham County, Georgia*, 403CV038. (App. G)

The County has not waived its sovereign immunity under state law. Georgia Constitution Article 1, § 2, ¶ 9 (e) provides:

> "Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can *only* be waived by an Act of the General Assembly which *specifically* provides that sovereign immunity is thereby waived and the extent of such waiver." (emphasis added)

This Constitutional provision, which amended the 1983 Constitution in 1991, applies to counties. *Gilbert v. Richardson, supra*, 264 Ga. at 746-747, 452 S.E. 2d at 478-479. The County's sovereign immunity can *only* be waived by a *specific act* of the General Assembly. Georgia Constitution Article 1, § 2, ¶ 9 (e); *Gilbert, supra*. This Constitutional provision became effective on January 1, 1991, and therefore applies because the incident at issue occurred on October 6, 2002.

Sovereign immunity "can *only* be waived pursuant to a '*legislative act which specifically provides thât sovereign immunity is waived and the extent of such waiver.*'" *Woodard v. Laurens County*, Ga., 265 Ga. 404, 405, 456 S.E. 2d 581, 582-583 (1995) (citing *Gilbert, supra*, at 748, 452 S.E. 2d at 479-480). (emphasis added) It cannot be waived by the mere purchase of insurance coverage. *Id.* In *Gilbert*, the Gilberts sued the Walker County Sheriff. *Gilbert, supra*, at 745, 452 S.E. 2d at 478. In *Gilbert*, the county's sovereign immunity was waived pursuant to O.C.G.A. § 33-24-51 (b) to

the extent of the amount of liability insurance purchased for the negligence of county officers, agents, servants, attorneys, or employees arising from the use of a motor vehicle and pursuant to O.C.G.A. § 36-85-1 which authorizes counties to participate in GIRMA (Georgia Interlocal Risk Management Agency). *Gilbert, supra*, at 748-749, 751-752, 452 S.E. 2d at 480-483.

The County has not waived its sovereign immunity pursuant to any legislative act because it does not participate in GIRMA nor has it purchased any liability insurance for claims arising from the use of a motor vehicle. *See also Woodard, supra, and Long v. Hall County Board of Commissioners*, 219 Ga. App. 853, 856-857, 467 S.E. 2d 186, 189-190 (1996). The General Assembly has not waived sovereign immunity for damages caused by county maintained bridges. *Kordares v. Gwinnett County*, 220 Ga. App. 848, 849-850, 470 S.E. 2d 479, 480-481 (1996).

Petitioners' assertion that Respondent maintained a continuing nuisance is without merit. A county cannot be liable for a nuisance except in the context of taking private property for public purposes resulting in an inverse condemnation. *Canfield v. Cook County*, 213 Ga. App. 625, 626, 445 S.E. 2d 375, 376 (1994). Petitioners do not allege the taking of private property or inverse condemnation nor do they allege that their boat was damaged by the Causton Bluff Bridge on more than one occasion. *See DeKalb County v. Orwig*, 261 Ga. 137, 139, 402 S.E.2d 513, 515 (1991). Petitioners' allegations are more in the nature of a tort, inflicting in one act direct injury to Petitioners' boat, especially since they allege that Respondent had a duty to operate and maintain the Bridge in a reasonably safe and prudent manner and breached a duty to them. *See Desprint Services, Inc. v. DeKalb County*, 188 Ga. App. 218, 220, 372 S.E. 2d 488, 490 (1988).

Petitioners' reliance on O.C.G.A. § 32-4-71 (b) is misplaced. It provides in relevant part that if "the condition of

bridge repair authorized by Code Section 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county. . . ." O.C.G.A. § 32-4-70 (b) provides in relevant part that "[w]here the contract relates to the construction or reconstruction of all or a part of a bridge, the county or counties affected may require the successful contractor to add to the conditions of the performance bond required under paragraph (1) of Code Section 32-4-69 the following condition: to keep the bridge in good condition for a period of not less than seven years." The Causton Bluff Bridge was constructed in 1963 and in the 1980's a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. (App. A, Aff. Drewry, ¶ 7) The seven year period has passed and therefore this provision does not apply.

Petitioners' assertion that Respondent's employees negligently performed ministerial functions is misplaced. Petitioners did not name any employees of Respondent in this action. It is true that a county may be liable for a county employee's negligence in performing an official function to the extent that the county has *waived* sovereign immunity. *Gilbert, supra*, at 754, 452 S.E. 2d at 484. Respondent has not waived its sovereign immunity. The distinction between ministerial and discretionary acts with regard to governing authorities appears to apply to municipalities and not counties. *See Early County v. Fincher*, 184 Ga. App. 47, 49, 360 S.E. 2d 602, 604 (1987) (*Early* predated the amendment to Georgia Constitution Article 1, § 2, ¶ 9 (e), which provides for a waiver of sovereign immunity only by a legislative act.)

The other cases relied on by Petitioners address whether individual officials are entitled to official immunity and focus on the particular functions performed by the *individual*

officials. *Woodard, supra* (Court discussed the determination of ministerial and discretionary acts in connection with actions of a county employee; the County was also afforded sovereign immunity. *Id.* at 406-407, 456 S.E. 2d at 583-584); *Stone v. Taylor*, 233 Ga. App. 886, 506 S.E. 2d 161 (1998) (Court addressed distinction between discretionary and ministerial acts in its discussion of whether two county officials were liable. *Id.* at 887-889, 506 S.E. 2d at 162-164).

Sovereign immunity, also referred to as "governmental immunity," applies to governmental entities such as counties. *Norris v. Emanuel County*, 254 Ga. App. 114, 116, 561 S.E. 2d 240, 242-243 (2002). Official immunity applies to government officials and employees sued in their individual capacities. *Id.* The distinction between discretionary and ministerial acts applies in the determination of official immunity in claims against government officials and employees, not counties. *See Norris, supra*, at 117, 561 S.E. 2d at 243. *See also Early County, supra*, at 49, 360 S.E. 2d at 604-605 (predates 1991 Constitutional amendment, discussed earlier; however, this case states that counties' sovereign immunity extends to ministerial *and* discretionary acts); and *Kordares, supra*, at 849-850, 470 S.E. 2d at 480-481.

CONCLUSION

The Eleventh Circuit Opinion and District Court Opinion correctly applied the controlling precedent of this Court and did not erroneously decide any questions of law. Respondent is entitled to residual common law sovereign immunity. The petition should be denied.

Respectfully submitted,

EMILY E. GARRARD *
CHATHAM COUNTY
ATTORNEY'S OFFICE
P.O. Box 8161
Savannah, GA 31412
(912) 652-7881

* Counsel of Record

Attorney for Respondent

APPENDICES

APPENDIX A

STATE OF GEORGIA
COUNTY OF CHATHAM

AFFIDAVIT OF ROBERT DREWRY

PERSONALLY APPEARED before the undersigned officer duly authorized by law to administer oaths, ROBERT DREWRY, who, first being duly sworn, deposes and says:

1. This Affidavit is made upon my personal knowledge. I am of legal age and competent to testify to the matters stated herein. I understand that this Affidavit will be utilized in support of Defendant's Motion for Summary Judgment or for such other purposes allowable by law in a lawsuit now pending in the U.S. District Court, Southern District of Georgia, entitled *Zurich Insurance Company, subrogated to the rights of James K. Ludwig and Carol Ludwig v. Chatham County, Georgia*, Civil Action No. CV403-099.

2. I am employed by Chatham County, Georgia ("County") as the Director of Public Works and Park Services. My department is responsible for operating and maintaining the bridges which are owned by the County.

3. Causton Bluff Bridge ("Bridge") is a drawbridge which is owned, operated and maintained by the County. The Bridge is permanently connected to the roadway of Islands Expressway. Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. A copy of an aerial photograph showing the Bridge is attached hereto as Exhibit 1.

4. The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counter-

weights, and pivot and braking mechanisms for each half of the span. The Bridge permits passage of light pleasure craft, tug and tow vessels and commercial vessels over the water of intercoastal waterway of the Wilmington River. The County employs bridge tenders to open the bridge for that purpose. The Bridge is not used as a navigational aid.

5. The County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. There is no charge to anyone for crossing the Bridge. Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. The County derives no income from operating and maintaining the Bridge.

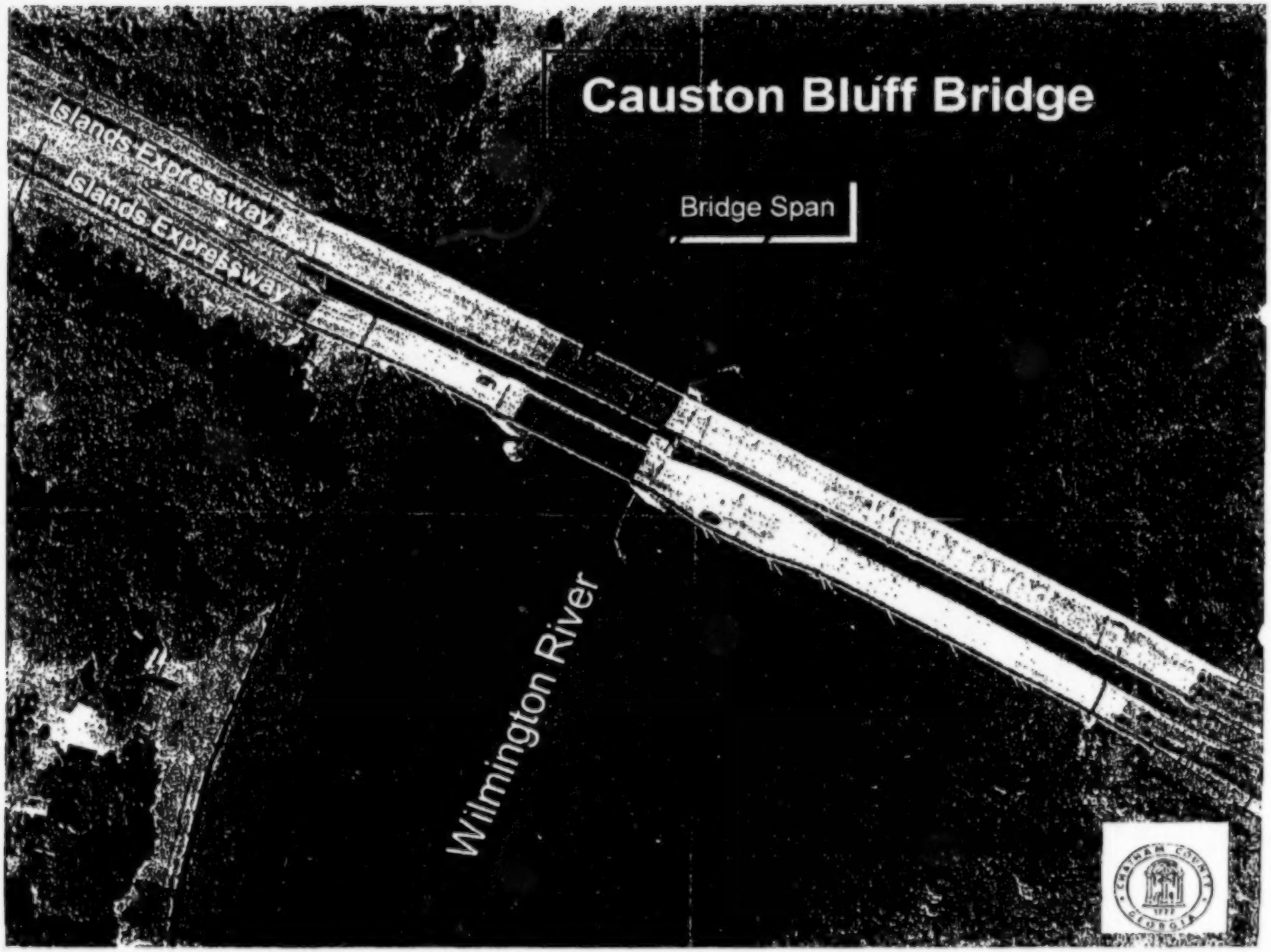
6. The Bridge is not intended to ply the navigable waters of the United States, carrying goods and passengers in commerce. When the spans are lifted or opened to allow water traffic to pass, they are performing a function ancillary to the primary purpose of bridging the distance between the two shores. At such times, the spans remain attached to the permanent piling structure, and carry no passengers or cargo in navigation. The spans do not make contact with the water.

7. Official records maintained in the ordinary course of business in the Public Works and Park Services Department show that the Bridge was constructed in 1963 when the Islands Expressway was constructed as a two-lane roadway. In the 1980's, a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. There has been no additional construction or reconstruction to the Bridge since the 1980's.

Further deponent sayeth naught.

/s/ Robert Drewry
ROBERT DREWRY

Sworn to and subscribed before me,
this 10th day of November, 2003
/s/ Dawn P. Carter, Notary Public


Causton Bluff Bridge
Bridge Span
Islands Expressway
Islands Expressway
Wilmington River

APPENDIX B

STATE OF GEORGIA
COUNTY OF CHATHAM

AFFIDAVIT OF WESLEY BOWERS

PERSONALLY APPEARED before the undersigned officer duly authorized by law to administer oaths, WESLEY BOWERS, who, first being duly sworn, deposes and says:

1. This Affidavit is made upon my personal knowledge. I am of legal age and competent to testify to the matters stated herein. I understand that this Affidavit will be utilized in support of Defendant's Motion for Summary Judgment or for such other purposes allowable by law in a lawsuit now pending in the U.S. District Court, Southern District of Georgia, entitled *Zurich Insurance Company, subrogated to the rights of James K. Ludwig and Carol Ludwig v. Chatham County, Georgia*, Civil Action No. CV403-099.

2. I am employed by Chatham County, Georgia ("County") as a bridge tender. I work in the bridges section of the Public Works and Parks Services Department. I sit in the bridge house of County bridges and open the bridges upon request from captains of vessels.

3. On October 6, 2002, James K. Ludwig was traveling in his vessel, the Love of My Life, on the intercoastal waterway of the Wilmington River. On that date, I was the bridge operator of the Causton Bluff Bridge ("Bridge").

4. On October 6, 2002, James K. Ludwig contacted the bridge operator of the Bridge and requested that the Bridge be raised to permit his vessel to transit the waters beneath the Bridge.

5. On October 6, 2002, I opened the Bridge pursuant to Mr. Ludwig's request.

6. I noticed that the north west span of the bridge was drifting down and immediately tried to make radio contact with Captain Ludwig.

7. I was unable to contact the vessel because the Captain turned off his radio prior to entering the Bridge operational area.

8. I stopped the span and started it back up; however, the Love of My Life hit the span.

9. The Love of My Life did not enter the channel of the Bridge, but deviated to the southwest, striking the Bridge. Further deponent sayeth naught.

/s/ Wesley Bowers
WESLEY BOWERS

Sworn to and subscribed before me,
this 18th day of November, 2003
/s/ Patricia Washington, Notary Public

APPENDIX C

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed July 8, 2004]

No. 04-10661
Non-Argument Calendar

D.C. Docket No. 03-00038-CV-4

CONTINENTAL INSURANCE COMPANY,
Subrogated to the rights of Dennis K. Rings,
Plaintiffs-Appellants,

versus

CHATHAM COUNTY, GA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

BEFORE TJOFLAT, BIRCH and DUBINA, *Circuit Judges.*

PER CURIAM:

In a comprehensive order dated January 14, 2004, the district court held that appellee Chatham County, Georgia is entitled to sovereign immunity from appellants' suit for damages sustained when a span of a draw bridge operated by the County struck appellant Riggs' vessel while it passed beneath the bridge. The court therefore granted the County summary judgment.

Appellants now appeal, contending that the district court erred in granting the County sovereign immunity and in denying their motion for summary judgment. Their appeal therefore turns on whether the court properly applied the law relating to sovereign immunity. We find no error in the court's ruling. We adopt its analysis of "common law" sovereign immunity versus Eleventh Amendment sovereign immunity and affirm the court's judgment.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

[Filed Jan. 14, 2004]

No. 403CV038

CONTINENTAL INSURANCE COMPANY,
subrogated to the rights of DENNIS K. RINGS,
Plaintiff,

v.

CHATHAM COUNTY, Georgia,
Defendant.

ORDER

I. INTRODUCTION

Plaintiffs Dennis K. Rings and his insurer, Continental Insurance Company ("CIC," on subrogration) bring this in *personam* vessel-damages admiralty action against Chatham County, Georgia, an intercoastal waterway draw bridge owner/operator. Doc. # 1. The County concedes that when it raised its bridge one of its bridge spans struck and damaged Rings's vessel while it passed beneath, but moves for summary judgment on sovereign immunity grounds. Doc. # 25. Plaintiffs move for summary judgment against the County, insisting that no such immunity applies and that the County's negligence supports their recovery. Doc. # 21.

II. BACKGROUND

The County owns and operates the "Causton Bluff Bridge," which is part of a multi-lane public road connecting Savan-

nah, Georgia with outlying islands. Doc. # 16 exh. A ¶¶ 3-5. The taxpayer-funded, non-revenue collecting/generating bridge crosses over an intercoastal waterway. *Id.*

Emphasizing that taxpayers pay to maintain/operate the bridge and that it collects no revenue from it, the County insists it exercised delegated State:power while operating the bridge on the day it damaged Rings's vessel. Doc. # 18 at 2; # 16 ¶¶ 3-6. Mindful that counties have been held to have waived sovereign immunity to the extent they have purchased insurance, the County also points out that it has no insurance for bridge mishaps. Doc. # 16 exh. C.

III. ANALYSIS

A. Sovereign Immunity

The County is "*not* asserting sovereign immunity based on the Eleventh Amendment immunity,[1] doc. # 25 at 1 (emphasis added), a defense a Florida county unsuccessfully invoked in *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1313-15 (11th Cir. 2003). Rather, it raises "common law" sovereign immunity illuminated in *Gilbert v. Richardson*, 264 Ga. 744, 745-46 (1994) and *Federal Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002) ("FMC"). *Id.* at 2-3.

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[1] The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. *See US. v. Texas Tech Univ.*, 171 F.3d 279, 285 n. 9, 288 (5th Cir. 1999) (Eleventh Amendment immunity deprives court of subject matter jurisdiction); *id.* at 285 ("While often noted for preserving state sovereignty, the Amendment only accomplishes this end through jurisdictional limitation").

Retracing the pre-Eleventh Amendment, "none-can-sue-the-king" sovereign immunity in *FMC*, that court characterized it as "residual and inviolable sovereign immunity. " 535 U.S. at 570 (quotes and cite omitted). States, that court explained, ceded to the federal government (under Article I of the U.S. Constitution) only so much of their sovereignty as was necessary to form the United States of America. *Id.* at 572. Hence, "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Alden v. Maine*, 527 U.S. 706, 712 (1999).

But this sovereign immunity was placed "into peril" when *Chisholm v. Georgia*, 2 Dall. 419 (1793), held that Article III of the Constitution authorized citizens of one State to sue another in federal court. *FMC*, 535 U.S. at 752. Congress and the States overturned Chisholm by passing the Eleventh Amendment. *See supra* note I.

In choosing that Amendment's text, Congress did not "explicitly memorializ[e] the full breadth of the sovereign immunity retained by the States," but chose only "to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision." *FMC*, 535 U.S. at 753 (quotes and cite omitted).

Otherwise, "the sovereign immunity enjoyed by the States extends *beyond* the literal text of the Eleventh Amendment." *Id.* at 754 (emphasis added).[2] The Eleventh Amendment was

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[2] Too, the Supreme Court has strengthened State sovereign immunity in recent years. *See Alden*, 527 U.S. at 712 ("the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state court"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (Congress lacks power under Article I to abrogate States' sovereign immunity from suits commenced or prosecuted in federal courts).

passed simply to restore the original constitutional design (*i.e.*, States were to retain their residual sovereign immunity and thus could not be sued in any court absent their consent). *Alden*, 527 U.S. at 713-30.

The *FMC* court held that State sovereign immunity bars the Federal Maritime Commission from adjudicating complaints filed by a private party against a nonconsenting State. *Id.* at 769. In other words, the State's sovereign immunity in that case precluded the Federal Maritime Commission from adjudicating a private party's complaint that the State-run port had violated the Shipping Act of 1984. *Id.* Absent its consent, then, a State cannot be "sued" in an agency tribunal, either.

It should be no surprise, then, that "the immunity of a State from suit *in personam* in the admiralty brought by a private person without its consent is clear." *Ex Parte State of New York*, 256 U.S. 490, 500 (1921), *reaffirmed in* FMC, 535 U.S. at 754, 767.[3]

Here the County insists that it is a political subdivision of the State, so the Court should deem it immune under the above reasoning, as well as that set forth in *Broward County, Fla. v. Wickman*, 195 F.2d 614 (5th Cir. 1952) (A Florida county, as a political subdivision of State, was immune in absence of consent from suit in admiralty for damages which

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[3] "While [such] immunity from suit is not absolute, the Supreme Court has recognized only two situations where an individual may sue a state: where suit is authorized by Congress in the exercise of its power to enforce the Fourteenth Amendment, and where a state has waived its sovereign immunity by consenting to suit." 2 MODERN TORT LAW: LIABILITY AND LITIGATION § 16:6 n. 1 (*State Governmental Immunity—in General*) (2d ed. Aug. 2003). Otherwise, "Congress lacks power under Article I to abrogate states' sovereign immunity from suits commenced or prosecuted in federal court. . . . [It also] lacks power under Article Ito subject a nonconsenting state to private suits for damages in its own courts as well." *Id.* § 16.6.

resulted when yacht struck an underwater projection which was part of abutment of drawbridge, owned by county, through which yacht was passing). Doc. # 25 at 3.

The *Broward County* court did not cite the Eleventh Amendment, but did cite *New York* and *Workman v. City of New York*, 179 U.S. 552, 570 (1900), to conclude that a Florida county which owned/operated a public bridge using power delegated from the State enjoyed sovereign immunity *from admiralty process*, 195 F.2d at 615, which is functionally the same as saying "immune from admiralty suit."

The result there was not, that court pointed out, inconsistent with *Workman's* holding that State immunity law could not trump substantive admiralty law over New York City, where "it was *assumed* that the City . . . was subject to admiralty process." *Id.* (emphasis added). Thus, although it did not expressly say so, the *Broward County* court applied "residual sovereign immunity" to immunize Broward county from the admiralty claims there.

At the same time, that court respected the rule, emanating from prior Supreme Court precedent, that where a city or some other municipal entity is otherwise before an admiralty court, admiralty law will preempt State immunity or limitation laws. 195 F.2d at 615.[4]

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[4] *Workman* is thus best viewed as a preemption (*i.e.*, federal admiralty law preempts conflicting state law) case:

> Thus, state laws which defeat existing maritime rights or enlarge existing maritime liabilities are traditionally preempted. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 741-42 (1961) (state statute of frauds may not be applied to defeat maritime breach of contract claim); *see also State of Md. Dept. of Natural Resources v. Kellum*, 51 F.3d 1220, 1226-28 (4th Cir. 1995) (applying admiralty preemption doctrine to prevent application of state statute that purported to increase the existing standard of care under maritime law in certain maritime tort actions).

Great Lakes Dredge and Dock Co. v. City of Chicago, 1996 WL 210081 at * 1 (N.D.Ill.1996) (unpublished).

B. "Part of the State"

The bottom line, then, is this: Whatever government entity is being sued, the first line of inquiry is whether it may be deemed a part of the State (a subdivision, agency, etc., exercising actual or delegated State power). If it can be so deemed, then that defendant may invoke residual sovereign immunity, of which Eleventh Amendment immunity may be viewed as a mere subset. *See Principe Compania Naviera, S.A. v. Bd. of Comm'rs of Port of New Orleans*, 333 F. Supp. 353, 354-56 (E.D. La. 1971) (Under Eleventh Amendment, court does not have jurisdiction to entertain a suit in admiralty against state or state agency which is an *integral part* of the state government; so, admiralty actions against *counties*, municipalities and other lesser governmental agencies and corporations which have an existence independent of state are not within the Eleventh Amendment's purview; since board of commissioners of the Port of New Orleans is not the state of Louisiana, the Eleventh Amendment did not bar invocation of admiralty jurisdiction in a shipowner's action against the Board for a maritime tort); *J. Ray McDermott & Co. v. Dep't of Highways, State of La.*, 267 F.2d 317, 318 (5th Cir. 1959) (applying "residual sovereign immunity" only—hence, *not* Eleventh Amendment immunity—to hold that State highway department could not be made to stand in judgment in a tort action in admiralty arising out of collision of libellant's barges with a bridge on a highway maintained by the department since the department is a department of the state which has not given its consent to be sued).

If the entity in question is not part of the State, then it does not matter if it claims to have been exercising a "governmental function." It remains amenable to *in personam* admiralty process and thus may be recovered against in admiralty court. To summarize:

> The rule of nonliability for torts where a *municipality* [*i.e.*, a city, not necessarily a county] is exercising a

> purely governmental function is not enforced in the admiralty courts.. The United States Supreme Court has held [in *Workman*, 179 U.S. at 570] that "in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction." [*Id.*] The United States Supreme Court has announced the doctrine that for every maritime tort there is redress if the admiralty court has jurisdiction of the offending person or thing. [In contrast,] *a quasi-municipal corporation, if immune from process in the state, would be immune from process in a suit in admiralty for a maritime tort.*

18 MCQUILLIN MUN. CORP. § 53.25 (3rd ed. Aug. 2003) (footnotes omitted; emphasis added); *Michaeledes v. Golden Gate Bridge, Highway and Transp. Dist.*, 202 F. Supp. 2d 1109, 1110 (N.D. Cal. 2002) ("[i]t has long been settled that a federal court exercising admiralty jurisdiction must respect a *state's* sovereignty") (emphasis added) (citing *New York*, 256 U.S. at 497-500; (1921); *Workman*, 179 U.S. at 566).

Sovereign-immunity determining courts, then, typically inquire whether the governmental entity being sued was exercising power delegated from the State, as opposed to acting in proprietary way (like a private corporation that constructs a bridge and charges tolls):

> [N]ot all public entities are possessed of the attributes of sovereignty that the state possesses. Lower courts are to determine a public entity's sovereignty "not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." *In re New York*, 256 U.S. at 500, 41 S.Ct. 588. *See also Workman*, 179 U.S. at 570, 573-74, 21 S.Ct.

> 212 (city is not a sovereign and may be sued in admiralty despite state law holding city immune from such suits).

Michaeledes, 202 F. Supp. 2d at 1111. Substance trumped nomenclature in *Michaeledes* because the action there in fact was against "'a municipal corporation or other governmental entity which is not an arm of the State.'" *Id.* (*quoting Alden*, 527 U.S. at 756); *see also id.* at 1112-13 (Golden Gate Bridge, Highway and Transportation District, although a "public entity" under California Tort Claims Act, was not an "arm of the state" entitled to assert sovereign immunity defense against injured employee's federal-court unseaworthiness claim; there was no evidence that judgment against District would be enforceable against state and no evidence that state exercised any decision-making authority for District or had any supervisory responsibility for District).

The issue at this juncture, then, is whether Chatham County has acted as a proprietary bridge operator or as an arm of the State. Under the narrower slice of sovereignty preserved by the Eleventh Amendment, case law allows county sheriff departments exercising State power to switch (county versus State) hats to invoke *Eleventh Amendment* immunity, depending on which sort of power they exercise:

> In Eleventh Amendment cases, this Court uses four factors to determine whether an entity is an "arm of the State" in carrying out a particular function: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity.

Manders v. Lee, 338 F.3d 1304, 1309 (11th Cir. 2003); *accord Vierling*, 339 F.3d at 1314 ("Thus, when an action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled

to invoke its sovereign immunity from suit") (quotes and cite omitted).

But *Manders* and *Vierling* focused on the narrower, Eleventh Amendment immunity,[5] not the broader swath of residual sovereign immunity *FMC* illuminated.[6] In the latter

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[5] Again, the County is not invoking the Eleventh Amendment, except in the sense that it may be viewed as a subset of residual sovereign immunity (though, as noted *supra* note 1, that Amendment also is viewed as an express, federal-court-jurisdiction-limiting response to *Chisholm*).

In any event, the Court acknowledges precedent showing that defendants invoking Eleventh Amendment immunity must prove its applicability. *Chisolm v. McManimon*, 275 F.3d 315, 323 (3d Cir. 2001). In contrast to "residual sovereign immunity," that ordinarily takes some doing. *See Vierling*, 339 F.3d at 1314-15; *Grimshaw v. South Florida Water Management Dist.*, 195 F.Supp.2d 1358, 1363-65 (S.D.Fla. 2002) (Regional water management district was arm of State of Florida entitled to Eleventh Amendment immunity; Florida legislature defined districts as operating under state control to perform state function with regional component, Florida exercised virtually absolute control over district's personnel, budget, policies and operations, Florida provided substantial portion of district's funds and exercised budget item control over all its resources, and, as practical matter, state's treasury was directly implicated by any judgment against district, both through budget and importance to State's future of maintaining financial viability of district).

Here, unsurprisingly, the County cites little compared to the water-management district's showing in *Grimshaw*. It points out that "taxpayer" dollars fund the bridge, doc. # 17 at 1-2, but does not indicate whether *State* versus *County* tax dollars are used (though, the State does authorize it to collect taxes). It also points out that Georgia law authorizes counties to provide for road construction and maintenance, acquire property for both roads and bridges, and thus exercise State delegated powers and governmental functions in constructing and maintaining roads and bridges. *Id.* at 5. But in contrast to what was shown in *Grimshaw*, it does not say much with respect to the degree of control the State exercises over it. In a later brief, the County basically just points to Georgia law showing that it is cloaked in the State's residual sovereign immunity until waiver is shown. Doc. # 25.

[6] Where residual sovereign immunity is shown, incidentally, Georgia courts place the burden on those opposing it to show that it has been

cases, Georgia courts scrutinize the overall intent and contour of the county entity, along with the stream of State power in which it navigates. "[T]here are a number of decisions holding," for example, Georgia

> county departments of family and children services [DFACS] to be instrumentalities of the state for other purposes. *See Horne v. Skelton*, 152 Ga.App. 654, 655(1), 263 S.E.2d 528 (county department of family and children services found to be an instrumentality of the state when power to appoint county director by the commissioner of DHR involved); *Employees Retirement System of Ga. v. Baughman*, 241 Ga. 339, 245 S.E.2d 282 (DFACS employees are state employees for the purpose of determining retirement benefits); and *Ga. Dept. of Human Resources v. Demory*, 138 Ga.App. 888, 227 S.E.2d 788 (DFACS determined to be a state instrumentality distinct from Hall County Board of Health, a county instrumentality, for purposes of workers' compensation). *Also see Bendiburg v. Dempsey*, 707 F. Supp. 1318 (N.D.Ga. 1989) (DFACS is instrumentality of the state for the purpose of Eleventh Amendment immunity).

Floyd County Grand Jury v. Dept. of Family & Children Servs., 218 Ga.App. 832, 834 (1995); *compare Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir.1990) (School board in Alabama county was not arm or alter ego of state, for Eleventh Amendment immunity purposes).

Floyd County's holding is consistent with the Georgia State government's basic contours; counties are geographical subdivisions administering (as do the County police, for

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waived. *CSX Transp., Inc. v. City of Garden City, Georgia*, 196 F.Supp.2d 1288, 1293 n. 5 (S.D.Ga. 2002), *aff'd in part and remanded for further proceedings*, F.3d, 2004 WL 491 17 (11th Cir. 1/12/04).

example) State-delegated (called "Home rule" and "Supplementary") powers at the county (local) level. *See Gilbert*, 264 Ga. at 747; Ga. Const. 1983, *as amended* 1991, Art. 9, § 1 ¶¶ 2-3. Counties, then, by power-decentralizing *design*, are political subdivisions of the State entitled to the same sovereign immunity as the State when they exercise State power.

Plaintiffs do not dispute that Georgia's constitution extends sovereign immunity to the state, its departments, agencies and also its counties. *Gilbert*, 264 Ga. at 747. Nor do they dispute that counties exercise State power to acquire land and build/operate roads and bridges. *See* O.C.G.A. § 32-4-92 (preamble) (enumerating State's delegation of its powers to a county with respect to county road systems); *id.* § 32-4-92(3)(A) (counties may exercise the State's power to condemn land for roads); *id.* § 32-4-92(8) & (11) (county can exercise the State's power to tax for roadbuilding/maintenance purposes); § 32-4-70-§ 32-4-71 (governing county authority to construct, reconstruct and repair bridges, payment bonds for same); *see also* § 32-4-90 *et seq.* (delegation of State power to municipalities for municipal street systems, including bridges).

The County, in acquiring the land and constructing/operating the public highway and bridge in question, exercised that very State power. And its mere act of building/operating roads and bridges does not waive its sovereign immunity. *See Kordares v. Gwinnett County*, 220 Ga.App. 848, 849-50 (1996) (County was protected by sovereign immunity from negligence claim arising from death of decedent who was killed when he attempted to cross county bridge, and bridge partially collapsed).[7]

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[7] This is not a new concept. *See Mann v. County Bd. of Arlington County*, 98 S.E.2d 515, 518 (Va. 1957) (Even though Arlington County had taken on characteristics of city and exercised many powers and

Indeed, courts more or less *presume* that when a county exercises State power (*e.g.*, police power) the State's sovereign immunity extends to it until the challenging party shows otherwise (*e.g.*, that the county waived its sovereign immunity by purchasing insurance). *See Smith v. Chatham County*, Ga.App., 2003 WL 22700904 at * 1 (11/17/03) (County had not purchased liability insurance for damages arising from negligence of duly authorized officer in performance of his official duties, and thus, county did not waive sovereign immunity from liability for injuries sustained by motorists when truck pursued by police officers collided with motorists' vehicle)[8]; *Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir.1993) ("The state of Georgia is immune to suit for any cause of action unless sovereign immunity is expressly waived by constitutional provision or

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performed many services customarily rendered by municipal corporations, and even though it had elected to operate its own system of roads, nevertheless "[i]n Virginia, territorially and politically, counties are integral parts of the State," so the county could not be held liable for injuries sustained by a pedestrian when an automobile crossed the curbing between a parking area and a sidewalk and crushed the pedestrian against a store front, allegedly as a result of the county's negligence in maintaining a parking area immediately adjacent to the sidewalk and in permitting motor vehicles to be parked perpendicular to the curb without stanchions or other safeguards to prevent their entering upon the sidewalk), cited in 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 399 (May 2003) ("[T]the view has been followed that, in the absence of statutory authorization, counties are generally not liable for injuries to persons or property caused by defects in their highways, streets, and bridges") and *id.* § 120.

[8] There the court noted that

> [t]he doctrine of sovereign immunity protects governments from legal action unless they have waived their immunity from suit. The immunity, at least for counties, may only be waived by a legislative act which specifically provides that sovereign immunity is waived and the extent of such waiver.

2003 WL 22700904 at * 1 (footnote omitted).

statute. This sovereign immunity extends to counties, as subdivisions of the state").

Here the County has no immunity-waiving insurance, and plaintiffs have not otherwise shown that the State or County waived the County's sovereign immunity. Nor is the County otherwise before the Court but attempting to invoke an admiralty-preempted State statute aimed at defeating or impinging admiralty law. See supra note 4.

IV. CONCLUSION

Accordingly, the Court *GRANTS* Chatham County, Georgia's motion for summary judgment (doc. # 16, as amended, doc. # 24), *DENIES* plaintiffs' motion for summary judgment (doc. # 21) and *DISMISSES* plaintiffs' Complaint *WITH PREJUDICE.*

This 14th day of January, 2004.

/s/ B. Avant Edenfield
B. AVANT EDENFIELD, Judge
United States District Court
Southern District of Georgia

APPENDIX E

§ 32-4-42. Powers.

The powers of a county with respect to its county road system, unless otherwise expressly limited by law, shall include but not be limited to the following:

(1) A county shall have the authority to negotiate, let, and enter into contracts with any person or any agency, county, or municipality of the state for the construction, maintenance, administration, or operation of any public road or activities incident thereto in such manner and subject to such express limitations as may be provided by Part 2 of this article or any other provision of law. A county shall also have the authority to perform such road work with its own forces or with a combination of its own forces and the work of a contractor, notwithstanding any contrary provisions of Chapter 91 of Title 36;

(2) A county shall have the authority to accept and use federal and state funds and to do all things necessary, proper, or expedient to achieve compliance with the provisions and requirements of all applicable federal-aid or state-aid acts and programs in connection with the county's public roads. Nothing in this title is intended to conflict with any federal law and, in case of such conflict, such portion as may be in conflict with such federal law is declared of no effect to the extent of the conflict;

(3)(A) A county shall have the authority to acquire and dispose of real property or any interest therein for public road purposes, as provided in Article 1 of Chapter 3 of this title and in Chapter 7 of this title. In any action to condemn property or interests therein for such purposes, notice thereof shall be signed by the condemning county; and such notice shall be deemed to be the official action of the county in regard to the commencement of such condemnation proceedings. For good

cause shown a county, at any time after commencement of condemnation proceedings and prior to final judgment therein, may dismiss its condemnation action, provided that (i) the condemnation proceedings have not been instituted under Article 1 of Chapter 3 of this title, and (ii) the condemnor has first paid to the condemnee all expenses and damages accrued to the condemnee up to the date of the filing of the motion for dismissal of the condemnation action.

(B) Pursuant to the requirements of Part 2 of this article, a county shall have the power to purchase, borrow, rent, lease, control, manage, receive, and make payment for all personal property, such as equipment, machinery, vehicles, supplies, material, and furniture, which may be needed in the operation of its county road system; to lease, rent, lend, or otherwise transfer temporarily county property used for road purposes, as authorized by law; to sell or otherwise dispose of all personal property owned by the county and used in the operation of the county road system which is unserviceable; and to execute such instruments as may be necessary in connection with the exercise of the powers described in this subparagraph;

(4) A county and its authorized agents and employees may enter upon any lands in the county for the purpose of making such surveys, soundings, drillings, and examinations as the county may deem necessary or desirable to accomplish the purposes of this title; and such entry shall not be deemed a trespass nor shall it be deemed an entry which would constitute a taking in a condemnation proceeding, provided that reasonable notice of such entry shall be given the owner or occupant of such property, such entry shall be done in a reasonable manner with as little inconvenience as possible to the owner or occupant of the property, and the county

shall make reimbursement for any actual damages resulting from such entry;

(5) A county shall have the authority to employ, discharge, promote, set and pay the salaries and compensation of its personnel, and determine the duties, qualifications, and working conditions for all persons whose services are needed in the construction, maintenance, administration, operation, and development of its county road system; to work inmates maintained in the county correctional institution or inmates hired from the Department of Corrections and maintained by the latter; and to employ or contract with such engineers, surveyors, attorneys, consultants, and all other employees as independent contractors whose services may be required, subject to the limitations of existing law;

(6) A county may grant permits and establish reasonable regulations for the installation, construction, maintenance, renewal, removal, and relocation of pipes, mains, conduits, cables, wires, poles, towers, traffic and other signals, and other equipment, facilities, or appliances of any utility in, on, along, over, or under the public roads of the county which are a part of the county road system lying outside the corporate limits of a municipality. However, such regulations shall not be more restrictive with respect to utilities affected thereby than are equivalent regulations promulgated by the department with respect to utilities on the state highway system under authority of Code Section 32-6-174. As a condition precedent to the granting of such permits, the county may require application in writing specifically describing the nature, extent, and location of the portion of the utility affected and may also require the applicant to furnish an indemnity bond or other acceptable security conditioned to pay any damages to any part of the county road system or to any member of the public

caused by work of the utility performed under authority of such permit. At all times it shall be the duty of the county to ensure that the normal operation of the utility does not interfere with the use of the county road system. The county may also order the removal or discontinuance of the utility, equipment, facility, or appliances where such removal and relocation are made necessary by the construction or maintenance of any part of the county road system lying outside the corporate limits of a municipality. In so ordering the removal and relocation of a utility or in performing such work itself, the county shall conform to the procedure set forth for the department in Code Sections 32-6-171 and 32-6-173, except that when the removal and relocation have been performed by the county, it shall certify the expenses thereof for collection to its county attorney;

(7) A county shall have the power to purchase supplies for county road system purposes through the state as authorized by Code Sections 50-5-100 through 50-5-102;

(8) In addition to any taxes authorized by Article 4 of Chapter 5 of Title 48 to be levied and collected for the construction and maintenance of its county road system and activities incident thereto, a county is authorized to levy and collect any millage as may be necessary for such purposes;

(9) A county may provide for surveys, maps, specifications, and other things necessary in designating, supervising, locating, abandoning, relocating, improving, constructing, or maintaining the county road system, or any part thereof, or any activities incident thereto or necessary in doing such other work on public roads as the county may be given responsibility for or control of by law;

(10) In addition to the powers specifically delegated to it in this title and except as otherwise provided by Code Section 12-6-24, a county shall have the authority to adopt and enforce rules, regulations, or ordinances; to require permits; and to perform all other acts which are necessary, proper, or incidental to the efficient operation and development of the county road system; and this title shall be liberally construed to that end. Any power vested in or duty placed on a county but not implemented by specific provisions for the exercise thereof may be executed and carried out by a county in a reasonable manner subject to such limitations as may be provided by law; and

(11) In all counties of this state having a population of 550,000 or more according to the United States decennial census of 1970 or any future such census, the county governing authority shall be empowered by ordinance or resolution to assess against any property the cost of reopening, repairing, or cleaning up from any public way, street, road, right of way, or highway any debris, dirt, sediment, soil, trash, building materials, and other physical materials originating on such property as a result of any private construction activity carried on by any developer, contractor, subcontractor, or owner of such property. Any assessment authorized under this paragraph, the interest thereon, and the expense of collection shall be a lien against the property so assessed coequal with the lien of other taxes and shall be enforced in the same manner as are state and county ad valorem property taxes by issuance of a fi. fa. and levy and sale as set forth in Title 48, known as the "Georgia Public Revenue Code."

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

[Filed June 10, 2005]

Case No. CV403-099

ZURICH INSURANCE CO. subrogated to the rights of JAMES K. LUDWIG, JR., and CAROL C. LUDWIG,
Plaintiffs,

v.

CHATHAM COUNTY, GEORGIA,
Defendant.

ORDER

Before the Court is Plaintiffs' Renewed Rule 60(b) Motion for Relief from this Court's June 28, 2004 Order granting Defendant summary judgment. (Doc. 34.) For the Reasons stated below, Plaintiffs' Motion is DENIED.

Plaintiffs filed this action in admiralty alleging that a raised span of the Causton Bluff draw bridge, which is owned and operated by Defendant, dropped and struck Plaintiff James Ludwig's yacht as it attempted to pass beneath the bridge. Defendant moved for summary judgment on sovereign immunity grounds, and by Order dated June 28, 2004, the Court granted that motion. In so doing, the Court explained that Defendant was entitled to summary judgment on grounds of "residual sovereign immunity" provided by common law and not Eleventh Amendment sovereign immunity. (Doc. 27 at 6-11.) Plaintiffs appealed this ruling to the Eleventh Circuit Court of Appeals. *Zurich Ins. Co. v. Chatham County*, No. 04-13308 (11th Cir. Jan. 28, 2005). The Court of Appeals affirmed the

dismissal of Plaintiffs' claims and reiterated this Court's reasoning that Defendant was protected from suit by residual immunity and not Eleventh Amendment immunity. *Id.* at 2-3.

Plaintiffs now argue that the Court should reconsider the dismissal of its claims due to the Georgia Supreme Court's decision in *Hines v. Georgia Ports Authority*, 278 Ga. 631 (2004). In that case, the court held that the Georgia Ports Authority is not an arm of the state entitled to sovereign immunity. *Hines*, 278 Ga. at 195. However, the court only applied Eleventh Amendment sovereign immunity law and did not discuss residual immunity. *Id.* Accordingly, *Hines* provides no grounds for the Court to disturb its previous rulings that Defendant is protected from suit by residual immunity.

Furthermore, the Eleventh Circuit issued its opinion affirming the dismissal of Plaintiffs' claims and reiterating this Court's residual immunity analysis several months after the Georgia Supreme Court issued its decision in *Hines* on October 12, 2004. Plaintiffs have failed to explain why the Court should issue an Order essentially overturning a decision of the Court of Appeals based on case law that was available to the Plaintiffs and the court on appeal.[1] Accordingly, Plaintiffs' Renewed Rule 60(b) Motion for Relief is DENIED, and this case remains CLOSED.

SO ORDERED, this 10th Day of June, 2005.

/s/ William T. Moore, Jr.,
WILLIAM T. MOORE, JR., Chief Judge
United States District Court
Southern District Of Georgia

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[1] Though *Hines* was decided days after Plaintiffs submitted their appellate brief, Plaintiffs could have alerted the Court of Appeals to the decision pursuant to Federal Rule of Appellate Procedure 28(j). Rule 28(j) provides in part, "if pertinent and significant authorities come to a party's attention after the party's brief has been filed . . . a party may advise the circuit clerk by letter . . . ."

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

[Filed April 25, 2005]

No. 403CV038

DENNIS K. RINGS and CONTINENTAL INSURANCE COMPANY,
Plaintiffs,

v.

CHATHAM COUNTY, GEORGIA,
Defendant.

ORDER

Plaintiffs Dennis K. Rings and Continental Insurance Company move this Court for F.R.Civ.P. 60(b)[1] relief from its 1/14/04 Order granting summary judgment to defendant Chatham County, Georgia (the County).

Plaintiffs' underlying admiralty action arose from damages sustained when a span of the Causton Bluff draw bridge, owned and operated by the County, struck Rings' vessel as it passed beneath the bridge. Doc. # 1. Although the County admitted that the drifting span damaged Rings' boat, it suc-

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[1] Plaintiffs seek relief under Rule 60(b)(1) or alternatively under Rule 60(b)(6). The Rule provides in relevant part that

> [o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment.

cessfully moved for summary judgment on sovereign immunity grounds. Doc. ## 16, 17, 36.

In granting that motion, the Court explained that

> [t]he County is "not asserting sovereign immunity based on the Eleventh Amendment immunity," doc. # 25 at 1 (emphasis added), a defense a Florida county unsuccessfully invoked in *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1313-15 (11th Cir. 2003). Rather, it raises "common law" sovereign immunity illuminated in *Gilbert v. Richardson*, 264 Ga. 744, 745-46 (1994) and *Federal Maritime Comm'n v. S. C. State Ports Auth.*, 535 U.S. 743, 753 (2002). . . .

Doc. # 36 at 1. After finding that residual sovereign immunity applied in the admiralty context, the Court considered whether the County was "part of the State" for immunity purposes. *Id.* at 3. Rather than applying the four-factor test used in Eleventh Amendment cases, the Court instead relied on "the broader swath of residual sovereign immunity." *Id.* Under that theory of immunity, courts "scrutinize the overall intent and contour of the county entity, along with the stream of State power in which it navigates" to determine whether it was acting as an arm of the state. *Id.*

Though counties are not protected by Eleventh Amendment immunity, *see Vierling*, 339 F.3d at 1314-15, when applying residual sovereign immunity, the Court held that counties "are political subdivisions of the State entitled to the same sovereign immunity as the State when they exercise State powers." Doc. # 36 at 6 (emphasis added). It then determined that the "County, in acquiring the land and constructing/operating the public highway and bridge [here], exercised that very State power." *Id.* Hence, it was entitled to residual sovereign immunity, requiring dismissal of the case.

On appeal, plaintiffs argued that this Court erred in its "determination that Georgia State law should be used to

evaluate whether Chatham County was an arm of the State of Georgia." Doc. # 44 at 2. They also contended that "in admiralty cases, the Eleventh Amendment and the `residual common law sovereign immunity' are fundamentally identical in the type and source of their immunity." *Id.*

So, plaintiffs concluded, they can sue the County since it is not immune. The appeals court rejected these arguments and adopted this Court's analysis of "common law" sovereign immunity verses Eleventh Amendment sovereign immunity. *Id.* at 3; doc. # 42.

In requesting Rule 60(b) relief, plaintiffs now argue that shortly after the Eleventh Circuit ruled, the Georgia Supreme Court addressed this very issue in *Hines v. Georgia Ports Authority*, 278 Ga. 631 (2004). Doc. # 44 at 6-7. There the court determined that the Georgia Ports Authority is not an arm of the state entitled to sovereign immunity. *Hines*, 278 Ga. at 195. However, the *Hines* court did not even mention residual/common law sovereign immunity, let alone discuss its ramifications. *Id.* Instead, that court applied only Eleventh Amendment sovereign immunity law, *id.* at 192-95, which this Court specifically distinguished. Doc. # 36 at 1, 5. Hence, that case provides no insight on whether the "arm of the state" test should be the same under both forms of sovereign immunity.

Moreover, several months after the *Hines* decision, the Eleventh Circuit cited this Court's analysis in a separate case holding that Chatham County does have residual sovereign immunity when operating the Causton Bluff Bridge. *Zurich Ins. Co. v. Chatham County, Georgia*, No. 04-13308 at 5-6 (11th Cir. 1/28/05) (unpublished).

Plaintiffs also argue that this Court erred in relying on Georgia case law, and that "[t]here is simply no basis for having separate tests for determining whether a political subdivision is an `arm of the state' under the Eleventh Amend-

ment and the residual common law sovereign immunity." Doc. # 49 at 7. These arguments were rejected on direct appeal. Doc. # 44 at 2; doc. # 42. They therefore cannot be relitigated under Rule 60(b) absent some extraordinary circumstance, which does not exist here. *See Carter v. Dolce*, 741 F.2d 758, 760 (5th Cir. 1984) (Rule 60(b) "may not be used merely to relitigate settled issues"); *Nemaizer v. Baker*, 793 F.2d 58, 63 (2d Cir.1986) (Rule 60(b)(6) requires extraordinary circumstances justifying relief from extreme and undue hardship); *Schiavo ex rel. Schindler v. Schiavo*, __ F.3d __, 2005 WL 681652 at *1 (11th Cir. 3/25/05) (the law-of-the-case doctrine precludes courts from revisiting issues decided explicitly or by necessary implication in a prior appeal).

Accordingly, the motion (doc. # 44) of plaintiffs Dennis K. Rings and Continental Insurance Company for F.R.Civ.P. 60(b) relief from judgment is *DENIED*. This case remains *CLOSED*.

This 22nd day of April, 2005.

/s/ B. Avant Edenfield
B. AVANT EDENFIELD, Judge
United States District Court
Southern District of Georgia

Supreme Court, U.S.
FILED
DEC 16 2005
OFFICE OF THE CLERK

No. 04-1618

IN THE

Supreme Court of the United States

NORTHERN INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

CHATHAM COUNTY, GEORGIA,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JUNE 1, 2005
CERTIORARI GRANTED OCTOBER 11, 2005

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RELEVANT DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Docket #: 04-13308-DD

Short Style: Zurich Insurance Co. v. Chatham County, GA

Docket Date: 07/06/2004

Nature of Suit: Contract Marine

* * *

07/07/2004	Briefing Notice Issued
07/07/2004	DKT7CIV (Docketing Notice confirming brief due date) issued. To: Clark, Fred S.; c:Garrard, Emily E.; c:Hart, R. Jonathan; c:Scott L. Poff

* * *

07/08/2004	Probable Jurisdiction Noted
07/16/2004	Civil Appeal Statement Form:

* * *

09/16/2004	Appellant Brief Filed: (Atty: Fred S. Clark)

* * *

09/27/2004	Appellee Brief Filed PT'D (edf): (Atty: R. Jonathan Hart)

* * *

01/28/2005	Judgment Entered
01/28/2005	OPIN1A (Notice of issuance of opinion) issued, costs taxed against appellant. c:Clark, Fred S.; c:Garrard, Emily E.; c:Hart, R. Jonathan; c:Moore, William T. Jr.
01/28/2005	Opinion Issued

02/11/2005	Petition for Rehearing: (Atty: Fred S. Clark)
	* * *
03/04/2005	The petition for rehearing filed by aplt Zurich Insurance is DENIED.
	* * *

RELEVANT DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

CIVIL DOCKET FOR CASE #: 4:03-cv-00099-WTM

* * *

Date Filed	#	Docket Text
06/02/2003	1	COMPLAINT for damages Filing Fee $150.00 Receipt #401569 (wwl) (Entered: 06/04/2003)
	* * *	
06/20/2003	3	ANSWER to Complaint by Chatham County, GA (Attorney R. Jonathan Hart, Emily E. Garrard) (wwl) (Entered: 06/23/2003)
	* * *	
11/24/2003	10	MOTION by Chatham County, GA for Summary Judgment. (kts) (Entered: 11/26/2003)
11/24/2003	11	MEMORANDUM by Chatham County, GA in support of [10-1] motion for Summary Judgment by Chatham County, GA (kts) (Entered: 11/26/2003)
11/24/2003	12	STATEMENT OF MATERIAL FACTS by defendant Chatham County, GA in support of [10-1] motion for Summary Judgment by Chatham County, GA (kts) (Entered: 11/26/2003)
	* * *	

12/16/2003	17	STATEMENT OF MATERIAL FACTS by plaintiff Zurich Insurance in support of [10-1] motion for Summary Judgment by Chatham County, GA (wwp) (Entered: 12/17/2003)
12/16/2003	18	RESPONSE by plaintiff Zurich Insurance to [12-1] material facts statement by Chatham County, GA (lne) (Entered: 12/17/2003)
12/16/2003	16	RESPONSE by Zurich Insurance to [10-1] motion for Summary Judgment by Chatham County, GA (wwp) Modified on 12/30/2003 (Entered: 12/30/2003)
12/16/2003	16	CROSS MOTION by Zurich Insurance for Summary Judgment (wwp) (Entered: 12/30/2003)
12/16/2003	20	MEMORANDUM by Zurich Insurance in opposition to [10-1] motion for Summary Judgment by Chatham County, GA (wwp) (Entered: 12/30/2003)
12/16/2003	23	NOTICE issued re: [16-1] cross motion for Summary Judgment by Plaintiff (wwp) (Entered: 12/30/2003)
	* * *	
12/29/2003	21	RESPONSE by Chatham County, GA to [16-1] cross motion for Summary Judgment by Zurich Insurance (lne) (Entered: 12/30/2003)

12/29/2003	22	RESPONSE by defendant Chatham County, GA to [17-1] material facts statement by Zurich Insurance (lne) (Entered: 12/30/2003)
01/22/2004	24	MEMORANDUM by Chatham County, GA in support of [10-1] motion for Summary Judgment by Chatham County, GA (lne) (Entered: 01/23/2004)
	* * *	
06/28/2004	27	ORDER denying [16-1] cross motion for Summary Judgment, denying [14-1] motion to Strike [10-1] Affidavit contained in motion for Summary Judgment by Chatham County, GA, granting [10-1] motion for Summary Judgment (signed by Chief Judge William T. Moore); [EOD Date 6/28/04] copies served. (kts) (Entered: 06/28/2004)
06/28/2004	28	JUDGMENT that in accordance with the Court's Order dated 6/28/04, Judgment is hereby entered for Chatham County, GA; [EOD Date 6/28/04] copies served. (kts) (Entered: 06/28/2004)
	* * *	
07/01/2004	29	NOTICE OF APPEAL by Zurich Insurance. FILING FEE $255.00 RECEIPT # 404296; copies served. [28-1] judgment order, [27-1] order (kts) (Entered: 07/02/2004)

	* * *	
02/11/2005	30	MOTION by Zurich Insurance for relief from judgment from this court's 6/28/04 order granting defendant's motion for summary judgment and memorandum of law in support with brief in support. (wwp) (Entered: 02/14/2005)
02/16/2005	31	ORDER denying [30-1] motion for relief from judgment from this court's 6/28/04 order granting defendant's motion for summary judgment. As this case is currently on appeal, the Court does not have jurisdiction to entertain Plaintiff's request. (signed by Chief Judge William T. Moore); [EOD Date 2/16/05] served. (nys) (Entered: 02/16/2005)
03/16/2005	32	JUDGMENT OF USCA (certified copy) AFFIRMED Re: [29-1] appeal by Zurich Insurance (kts) (Entered: 03/17/2005)
	* * *	
03/18/2005	33	ORDERED that the Judgment of the 11th Circuit is made the judgment of this Court. (signed by Chief Judge William T. Moore); [EOD Date 3/21/05] copies served. (wwp) (Entered: 03/21/2005)

03/29/2005	34	SUPPLEMENTAL MOTION (RENEWED RULE 60(b) by Zurich Insurance referring to: [30-1] motion for relief from judgment from this court's 6/28/04 order granting defendant's motion for summary judgment and memorandum of law in support by Zurich Insurance (nys) (Entered: 04/01/2005)
04/11/2005	35	RESPONSE by Chatham County, GA in opposition to [34-1] supplemental motion by Zurich Insurance (bcw) (Entered: 04/13/2005)
05/19/2005	36	RESPONSE in Opposition re 34 Motion for Miscellaneous Relief, 30 Motion for Miscellaneous Relief filed by Chatham County, GA. (jgb) (Entered: 05/20/2005)
05/20/2005	37	SUPPLEMENTAL BRIEF by Zurich Insurance Company. Amendment to 34 Motion for relief from Judgment from this Court's June 28, 2004 Order. (kts) (Entered 05/23/2005)
06/10/2005	38	ORDER denying 34 Motion for Relief from this Court's June 28, 2004 Order granting Defendant Summary Judgment. Signed by Judge William T. Moore on 6/10/05. (kts) (Entered: 06/13/05)

06/30/2005	39	NOTICE OF APPEAL as to 38 Order on Motion for Miscellaneous Relief by Zurich Insurance Company. Filing fee $255, receipt number 406819. (Attachments: # 1 Receipt for Notice of Appeal) (kts) (Entered: 06/30/2005)
	* * *	
08/24/2005	41	USCA ORDER dismissing 39 Notice of Appeal for want of prosecution because the appellant has failed to file the appellant's brief within the time fixed by the rules. (kts) (Entered: 08/25/2005)
09/12/2005	42	ORDER of USCA as to 39 Notice of Appeal granting Appellant's motion to reinstate this and to file its initial brief out of time (kts) (Entered: 09/12/2005)
	* * *	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN ADMIRALTY

ZURICH INSURANCE CO. subrogated to the rights of JAMES K. LUDWIG, JR. and CAROL C. LUDWIG	)	
Plaintiffs,	)	
vs.	)	Civil Action No. CV 403-099
CHATHAM COUNTY, GEORGIA,	)	
Defendant.	)	

COMPLAINT FOR DAMAGES

ZURICH INSURANCE COMPANY, ("Plaintiff") by and through undersigned counsel, hereby files suit against CHATHAM COUNTY, GEORGIA ("Chatham"), and alleges as follows:

1. This Court has subject matter jurisdiction over this matter under the Admiralty and Maritime Jurisdiction of the United States District Court, 28 U.S.C. §1333. Specifically, this action concerns damage inflicted upon a vessel traversing the navigable waterways of the United States.

2. This is an action for relief within the admiralty and maritime jurisdiction of the United States District Court and is brought pursuant to and within the meaning of Rule 9(h) of the Federal Rules of Civil

Procedure and Supplemental Rules governing admiralty and maritime claims.

3. At all times pertinent hereto, JAMES K. LUDWIG, JR. and CAROL C. LUDWIG ("LUDWIG"), resided at 1013 Lewis O. Gray Drive, Saugus, MA 01906.

4. At all times pertinent hereto, Plaintiff, ZURICH INSURANCE was, and is, a corporation organized under the laws of the State of Maryland.

5. At all times pertinent hereto, CHATHAM COUNTY, Georgia was, and is, a distinct political entity with an identity separate from, but located within, the State of Georgia.

6. At all times material hereto, the Defendant and/or its agents and/or employees:

   a. Owned, operated, supervised and performed physical repairs to the Causton Bluff Bridge in CHATHAM COUNTY, Georgia.

   b. Financially supported, maintained, and financed repairs to the Causton Bluff Bridge using funds allocated by the governing body of CHATHAM COUNTY.

7. At all times material hereto, the Causton Bluff Bridge ("Bridge"):

   a. Existed over the navigable waters of the United States of America

   b. Was an obstruction to navigation of the navigable waters of the United States of America near Savannah, Georgia, specifically the Wilmington River, a/k/a the Atlantic Intercoastal Waterway, a/k/a the Savannah River.

c. Existed within the bounds of CHATHAM COUNTY, Georgia.

d. Was built and operated pursuant to a plan authorized, reviewed and permitted by the United States Coast Guard.

e. Was built and operated subject to a permit authorized by the U.S. Army Corps of Engineers.

f. Was an obstruction to the navigation of the navigable waterway with a vertical clearance beneath the bridge of 21 feet when in a down or closed position, especially when such closure occurred while a vessel was transiting beneath the span of the bridge;

g. Was required to be open for the passage of vessel in accordance with U.S. Coast Guard regulations and 33 C.F.R. §117.353(b)(specifically addressing the Causton Bluff Bridge);

h. Had a known mechanical defect which caused the raised sections of the bridge to slip under certain weather conditions;

i. This mechanical defect was known to CHATHAM COUNTY, and known to have existed for years as it had caused the bridge to strike and damage other vessels; and

j. The mechanical defect was acknowledged by CHATHAM COUNTY as being the proximate cause of other times when the bridge fell on or nearly upon vessels traveling upon the navigable waters of the United States of America.

8. Venue is proper in the United States District Court for the Southern District of Georgia, Savannah Division, as the incident giving rise to this lawsuit occurred on the navigable waters of the United States

and within CHATHAM COUNTY Georgia, and Defendant is a political entity with a separate and distinct political identity existing in the state of Georgia.

9. On October 6, 2002, James K. Ludwig was the owner of the vessel "LOVE OF MY LIFE", a Catalina 400 yacht, 40 feet in length, containing a mast and sail.

10. On October 6, 2002, the LOVE OF MY LIFE was insured under a policy of marine insurance, number YT 98539530, which was issue to James K. Ludwig, Jr. & Carol Caefer by ZURICH Insurance.

11. On October 6, 2002, James K. Ludwig hailed the bridge operator, an employee of Chatham County, for the Causton Bluff Bridge and requested the span be opened to permit the passage of the vessel LOVE OF MY LIFE.

12. The bridge operator complied with the request and opened the span so that the LOVE OF MY LIFE could transit under the bridge.

13. As the LOVE OF MY LIFE was transiting under the bridge, a raised section of the drawbridge dropped and/or closed on top of the LOVE OF MY LIFE's mast.

14. As a result of premature closing, or failure of the mechanical workings of the bridge, the LOVE OF MY LIFE suffered substantial and significant damage to her mast and rigging and hull.

15. Plaintiff has had to expend significant time and monetary resources to repair the damage to the LOVE OF MY LIFE pursuant to the policy of marine insurance issued to Ludwig as a result of the

bridge closing on top of the mast of the LOVE OF MY LIFE.

16. The aforesaid damage was caused solely through the fault, want of care and/or failure to repair or replace a known obstruction to Interstate Commerce and Navigation on the part of the Defendant and/or those whom the Defendant is responsible for as an employer of owner/operator of the Causton Bluff Bridge. Furthermore, aforesaid damage was the result of the operation of said bridge in violation of the terms of the Bridge Permit issued by the U. S. Coast Guard and the regulation contained within 33 C.F.R. §117.353(b), which specifically apply to the operation of the Causton Bluff Bridge.

17. All conditions necessary to bring this action have been satisfied or waived.

18. As a result of the damages sustained by LOVE OF MY LIFE, Plaintiffs have suffered damages in excess of $30,000.00.

COUNT 1:

NEGLIGENCE OF DEFENDANT CHATHAM COUNTY, GEORGIA

Plaintiffs reassert and re-allege the allegations contained in paragraphs 1 through 18 as though fully set forth herein.

19. The Causton Bluff Bridge constitutes an obstruction to navigation of the navigable waterways or be a nuisance to navigation of the United States. The bridge is allowed to obstruct the waterway only if operated in accordance with a permit issued by the U.S. Coast Guard.

20. The permit issued to the Causton Bluff Bridge by the U.S. Coast Guard governs and directs and limits the operation of the bridge as an obstruction to

navigation. Specifically, the bridge must not obstruct or be a nuisance to the navigation of a vessel attempting to transit the bridge's location.

21. On the date in question, the Causton Bluff Bridge did not conform to the bridge permit, i.e. the bridge operations violated the limitations of the U.S. Coast Guard permit, the laws of the federal government, and Georgia state law concerning known nuisances by obstructing the navigation of the LOVE OF MY LIFE and posing a safety hazard which was known to CHATHAM COUNTY but which could not have been discovered by Ludwig or avoided by him had he known of the danger.

22. Defendant, CHATHAM COUNTY, owed Plaintiffs a duty to operate and maintain the Causton Bluff Bridge in a reasonably safe and prudent manner, and to avoid causing damage to vessels which have to traverse the Causton Bluff Bridge which is an obstacle and nuisance to navigation.

23. Defendant, CHATHAM COUNTY, Georgia, breached the duty owed to Plaintiffs in that the Causton Bluff Bridge, which it maintained, negligently struck the LOVE OF MY LIFE, on October 6, 2002.

24. Defendant, CHATHAM COUNTY, Georgia, was negligent in the following respects:

    1. Failing to keep a proper lookout.

    2. Failing to maintain a competent and attentive bridge tender.

    3. Failing to maintain the Causton Bluff Bridge and its machinery in a safe and reasonably prudent manner.

    4. Failing to properly train its bridge tender.

5. Obstructing the navigation of the LOVE OF MY LIFE.

6. Failing to notify vessels of dangerous condition existing as a result of damage to the mechanism of the Causton Bluff Bridge.

7. Failing to correct a known and obvious nuisance.

8. Other acts of negligence which will be proved at the time of trial.

25. Defendant, CHATHAM COUNTY, Georgia's negligence was the direct and proximate cause of the damage to the LOVE OF MY LIFE and the Plaintiff.

COUNT II

DEFENDANT CHATHAM COUNTY MAINTAINED A CONTINUING NUISANCE

Plaintiffs re-assert and re-allege the allegations contained in paragraphs 1 through 25 as though fully set forth herein.

26. The Causton Bluff Bridge constitutes an obstruction to navigation of the navigable waterways or be a nuisance to navigation of the United States. The bridge is allowed to obstruct the waterway only if operated in accordance with a permit issued by the U.S. Coast Guard.

27. The permit issued to the Causton Bluff Bridge by the U.S. Coast Guard governs and directs and limits the operation of the bridge as an obstruction to navigation. Specifically, the bridge must not obstruct or be a nuisance to the navigation of a vessel attempting to transit the bridge's location.

28. On the date in question, the Causton Bluff Bridge did not conform to the bridge permit, i.e. the bridge operations violated the limitations or the U.S. Coast Guard permit, the laws of the federal government, and Georgia state law concerning known nuisances by obstructing the navigation of the LOVE OF MY LIFE and posing a safety hazard which was known to CHATHAM COUNTY but which could not have been discovered by Ludwig or avoided by him had he known of the danger.

29. Defendant, CHATHAM COUNTY, owed Plaintiffs a duty to operate and maintain the Causton Bluff Bridge in a reasonably safe and prudent manner, and to avoid causing damage to vessels which have to traverse the Causton Bluff Bridge which is an obstacle and nuisance to navigation.

30. Defendant, CHATHAM COUNTY, Georgia, breached the duty owed to Plaintiffs in that the Causton Bluff Bridge, which it maintained, struck the LOVE OF MY LIFE, on October 6, 2002.

31. The Defendant, CHATHAM COUNTY, Georgia, was aware of the defective condition of the bridge as the bridge had struck and damaged other vessels while the bridge had been elevated to allow similar vessels to ply the river through the bridge.

32. Defendant, CHATHAM COUNTY, Georgia's maintenance of the continuing nuisance was the direct and proximate cause of the damage to the LOVE OF MY LIFE and the Plaintiff.

COUNT III

STATUTORY AND/OR REGULATORY FAULT FOR VIOLATION OF THE NAVIGABLE SERVITUDE ENCOMPASSED BY THE U.S. COAST GUARD AND U.S. CORP OF ENGINEER'S PERMITS

Plaintiffs re-assert and re-allege the allegations contained in paragraphs 1 through 32 as though fully set forth herein.

33. The Causton Bluff Bridge was built and operated subject to compliance with permits issued by the U.S. Coast Guard and the U.S. Corp of Engineers as the bridge, with a clearance when closed of only 21 feet, represented an obstruction and/or nuisance to navigation of commerce on the interstate waterways of the United States.

34. The Causton Bluff Bridge was required to be opened and operated in conformance with 33 C.F.R. §117.353(b).

35. The closure of the Causton Bluff Bridge, which spanned the Intercoastal Waterway, while a vessel was transiting beneath said bridge constituted a violation of the U.S. Coast Guard permit, the U.S. Corp of Engineer's permit and the language of 33 C.F.R. §117.353(b).

36. Defendant, CHATHAM COUNTY, Georgia's violation of the U.S. Coast Guard and U.S. Corp of Engineer's permits and the regulations contained in 33 C.F.R. §117.353(b) were a direct and proximate cause of the damage to the LOVE OF MY LIFE and the Plaintiff and constituted an obstruction to interstate Commerce.

WHEREFORE, Plaintiffs pray that:

1. Process may be issued against CHATHAM COUNTY, Georgia citing them to appear and answer the Complaint.
2. The Court enter a Judgment against the Defendant for all damages suffered by Plaintiffs together with costs, attorney's fees and prejudgment interest.
3. Plaintiffs request all other equitable relief as justice may require or dictate.

CLARK AND CLARK
/s/
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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

ZURICH INSURANCE COMPANY, Subrogated to the Rights of JAMES K. LUDWIG and CAROL C. LUDWIG,	)	
Plaintiffs,	)	
vs.	)	CASE NUMBER CV403-099
CHATHAM COUNTY, GEORGIA	)	
Defendant.	)	

CHATHAM COUNTY, GEORGIA'S ANSWER

NOW COMES CHATHAM COUNTY, GEORGIA ("County") and answers Plaintiff's complaint. The County shows the Court the following:

FIRST DEFENSE

The County is entitled to sovereign immunity.

SECOND DEFENSE

Plaintiff's complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

The County has acted in good faith at all relevant times.

FOURTH DEFENSE

Plaintiff's insured proximately caused the alleged damages.

FIFTH DEFENSE

The County answers the numbered paragraphs of Plaintiff's complaint as follows:

1. The County admits the allegations contained in the first sentence of paragraph 1 of Plaintiff's complaint. The County denies the remaining allegations contained in paragraph 1 of Plaintiff's complaint.

2. Answering the allegations contained in paragraph 2 of Plaintiff's complaint, the County admits that Plaintiff has brought this action as an admiralty and maritime case. The County denies the remaining allegations contained in paragraph 2 of Plaintiff's complaint regarding any liability of the County.

3. The County is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of Plaintiff's complaint.

4. The County is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of Plaintiff's complaint.

5. The County denies the allegations contained in paragraph 5 of Plaintiff's complaint. Further answering, the County states that it is a body corporate and politic and is a political subdivision of the State of Georgia.

6. The County admits the allegations contained in paragraph 6 of Plaintiff's complaint and subparagraphs a and b.

7. The County denies the allegations contained in paragraph 7 of Plaintiff's complaint and denies the allegations contained in subparagraphs a through j.

8. Answering the allegations contained in paragraph 8 of Plaintiff's complaint, the County admits that venue is proper in this Court and that an incident occurred at the Causton Bluff Bridge involving a vessel. The County denies the re-

maining allegations contained in paragraph 8 of Plaintiff's complaint.

9. The County is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of Plaintiff's complaint.

10. The County is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of Plaintiff's complaint.

11. Answering the allegations contained in paragraph 11 of Plaintiff's complaint, the County admits that the operator of a sailboat, "Love of My Life," requested that the operator of the Causton Bluff Bridge open the bridge to permit passage of "Love of My Life." The County is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 11 of Plaintiff's complaint.

12. The County is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of Plaintiff's complaint regarding who made a request for the bridge to be opened. Further answering, the County states that the bridge was opened to permit the passage of Love of My Life.

13. The County denies the allegations contained in paragraph 13 of Plaintiff's complaint.

14. The County denies the allegations contained in paragraph 14 of Plaintiff's complaint.

15. The County denies the allegations contained in paragraph 15 of Plaintiff's complaint.

16. The County denies the allegations contained in paragraph 16 of Plaintiff's complaint.

17. The County denies the allegations contained in paragraph 17 of Plaintiff's complaint.

18. The County denies the allegations contained in paragraph 18 of Plaintiff's complaint.

COUNT 1:

NEGLIGENCE OF DEFENDANT CHATHAM COUNTY, GEORGIA

The County incorporates herein by reference its responses to paragraphs 1 through 18 as if fully stated herein

19. The County denies the allegations contained in paragraph 19 of Plaintiff's complaint.

20. The County denies the allegations contained in paragraph 20 of Plaintiff's complaint.

21. The County denies the allegations contained in paragraph 21 of Plaintiff's complaint.

22. The County denies the allegations contained in paragraph 22 of Plaintiff's complaint.

23. The County denies the allegations contained in paragraph 23 of Plaintiff's complaint.

24. The County denies the allegations contained in paragraph 24 of Plaintiff's complaint and denies subparagraphs 1 through 8 of paragraph 24 of Plaintiff's complaint.

25. The County denies the allegations contained in paragraph 25 of Plaintiff's complaint.

COUNT II

DEFENDANT CHATHAM COUNTY MAINTAINED A CONTINUING NUISANCE

The County incorporates herein by reference its responses to paragraphs 1 through 25 as if fully stated herein

26. The County denies the allegations contained in paragraph 26 of Plaintiff's complaint.

27. The County denies the allegations contained in paragraph 27 of Plaintiff's complaint.

28. The County denies the allegations contained in paragraph 28 of Plaintiff's complaint.

29. The County denies the allegations contained in paragraph 29 of Plaintiff's complaint.

30. The County denies the allegations contained in paragraph 30 of Plaintiff's complaint.

31. The County denies the allegations contained in paragraph 31 of Plaintiff's complaint.

32. The County denies the allegations contained in paragraph 32 of Plaintiff's complaint.

COUNT III

STATUTORY AND/OR REGULATORY FAULT FOR VIOLATION OF THE NAVIGABLE SERVITUDE ENCOMPASSED BY THE U.S. COAST GUARD AND U.S. CORPS OF ENGINEER'S PERMITS

The County incorporates herein by reference its responses to paragraphs 1 through 32 as if fully stated herein

33. The County denies the allegations contained in paragraph 33 of Plaintiff's complaint.

34. The County denies the allegations contained in paragraph 34 of Plaintiff's complaint.

35. The County denies the allegations contained in paragraph 34 of Plaintiff's complaint.

36. The County denies the allegations contained in paragraph 36 of Plaintiff's complaint.

WHEREFORE, the County respectfully requests that the Court dismiss Plaintiff's complaint.

Respectfully submitted this 20th day of June, 2003.

/s/
R. JONATHAN HART
State Bar No. 333692

/s/
EMILY E. GARRARD
State Bar No. 286180

ATTORNEYS FOR DEFENDANT

P. O. Box 8161
Savannah, GA 31412

(912) 652-7881

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

ZURICH INSURANCE COMPANY Subrogated to the Rights of JAMES K. LUDWIG, JR. and CAROL C. LUDWIG,	)	
Plaintiffs,	)	
vs.	)	CASE NUMBER CV 403-099
CHATHAM COUNTY, GEORGIA	)	
Defendant.	)	

CHATHAM COUNTY, GEORGIA'S STATEMENT OF MATERIAL FACTS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED AND CONCLUSIONS OF LAW

NOW COMES CHATHAM COUNTY, GEORGIA ("County") pursuant to Local Rule 56.1 and shows the Court the following:

1. Causton Bluff Bridge ("Bridge") is a drawbridge which is owned, operated and maintained by the County. (Aff. Drewry, ¶ 3) The Bridge is permanently connected to the roadway of Islands Expressway. (*Id.*) Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. (*Id.*, Exh. 1)

2. The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington

River. (Aff. Drewry, ¶ 4) The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half of the span. (*Id.*) The Bridge permits passage of light pleasure craft, tug and tow vessels and commercial vessels over the water of intercoastal waterway of the Wilmington River. (*Id.*) The County employs bridge tenders to open the bridge for that purpose. (*Id.*) The Bridge is not used as a navigational aid. (*Id.*)

3. The County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. (Aff. Drewry, ¶ 5) There is no charge to anyone for crossing the Bridge. (*Id.*) Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. (*Id.*) The County derives no income from operating and maintaining the Bridge. (*Id.*)

4. The Bridge is not intended to ply the navigable waters of the United States, carrying goods and passengers in commerce. (Aff. Drewry, ¶ 6) When the spans are lifted or opened to allow water traffic to pass, they are performing a function ancillary to the primary purpose of bridging the distance between the two shores. (*Id.*) At such times, the spans remain attached to the permanent piling structure, and carry no passengers or cargo in navigation. (*Id.*) The spans do not make contact with the water. (*Id.*)

5. The Bridge was constructed in 1963 when the Islands Expressway was constructed as a two-lane roadway. (Aff. Drewry, ¶ 7) In the 1980's, a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. (*Id.*) There has been no additional construction or reconstruction to the Bridge since the 1980's. (*Id.*)

6. On October 6, 2002, James K. Ludwig was traveling in his vessel, the Love of My Life, on the intercoastal waterway of the Wilmington River. (Aff. Bowers, ¶ 3)

7. On October 6, 2002, James K. Ludwig contacted the bridge operator of the Bridge and requested that the Bridge be raised to permit his vessel to transit the waters beneath the Bridge. (Aff. Bowers, ¶ 4)

8. On October 6, 2002, the bridgetender opened the Bridge pursuant to Mr. Ludwig's request. (Aff. Bowers, ¶ 5)

9. The bridgetender noticed that the northwest span of the bridge was drifting down and immediately tried to make radio contact with Captain Ludwig. (Aff. Bowers, ¶ 6)

10. The bridgetender was unable to contact the vessel because the Captain turned off his radio prior to entering the Bridge operational area. (Aff. Bowers, ¶ 7)

11. The bridgetender stopped the span and started it back up; however, the Love of My Life hit the span. (Aff. Bowers, ¶ 8)

12. The Love of My Life did not enter the channel of the Bridge, but deviated to the southwest, striking the Bridge. (Aff. Bowers, ¶ 9)

13. Chatham County is entitled to sovereign immunity as to Plaintiff's federal admiralty claim.

14. Chatham County is entitled to sovereign immunity as to any state tort claim.

Respectfully submitted this 24th day of November, 2003.

/s/

R. JONATHAN HART
State Bar No. 333692
EMILY E. GARRARD
State Bar No. 286180

ATTORNEYS FOR CHATHAM COUNTY, GEORGIA

P. O. Box 8161
Savannah, GA 31412
(912) 652-7881

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

ZURICH INSURANCE COMPANY, Subrogated to the Rights of JAMES K. LUDWIG and CAROL C. LUDWIG,	)	
Plaintiffs,	)	
vs.	)	CASE NUMBER CV403-099
CHATHAM COUNTY, GEORGIA	)	
Defendant.	)	

CHATHAM COUNTY, GEORGIA'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

NOW COMES CHATHAM COUNTY, GEORGIA ("County") in support of its motion for summary judgment and shows the Court the following:

I. FACTS

Causton Bluff Bridge ("Bridge") is a drawbridge which is owned, operated and maintained by Chatham County. (Aff. Drewry, ¶ 3) The Bridge is permanently connected to the roadway of Islands Expressway. (*Id.*) Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. (*Id.*, Exh. 1)

The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington

River. (Aff. Drewry, ¶ 4) The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counterweights and pivot and braking mechanisms for each half of the span. (*Id.*)

The Bridge permits passage of light pleasure craft, tug and tow vessels and commercial vessels over the water of intercoastal waterway of the Wilmington River. (*Id.*) The County employs bridge tenders to open the bridge for that purpose. (*Id.*) The Bridge is not used as a navigational aid. (*Id.*)

The County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. (Aff. Drewry, ¶ 5) There is no charge to anyone for crossing the Bridge. (*Id.*) Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. (*Id.*) The County derives no income from operating and maintaining the Bridge. (*Id.*)

The Bridge is not intended to ply the navigable waters of the United States, carrying goods and passengers in commerce. (Aff. Drewry, ¶ 6) When the spans are lifted or opened to allow water traffic to pass, they are performing a function ancillary to the primary purpose of bridging the distance between the two shores. (*Id.*) At such times, the spans remain attached to the permanent piling structure, and carry no passengers or cargo in navigation. (*Id.*) The spans do not make contact with the water. (*Id.*)

The Bridge was constructed in 1963 when the Islands Expressway was constructed as a two-lane roadway. (Aff. Drewry, ¶ 7) In the 1980's, a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. (*Id.*) There has been no additional construction or reconstruction to the Bridge since the 1980's. (*Id.*)

On October 6, 2002, James K. Ludwig was traveling in his vessel, the Love of My Life, on the intercoastal waterway of the Wilmington River. (Aff. Bowers, ¶ 3) On that date, Mr. Ludwig contacted the bridge operator of the Bridge and requested that the Bridge be raised to permit his vessel to transit the waters beneath the Bridge. (*Id.*, ¶ 4)

On October 6, 2002, the bridge tender opened the Bridge pursuant to Mr. Ludwig's request. (Aff. Bowers, ¶ 5) The bridge tender noticed that the northwest span of the bridge was drifting down and immediately tried to make radio contact with Captain Ludwig. (*Id.*, ¶ 6) The bridge tender was unable to contact the vessel because the Captain turned off his radio prior to entering the Bridge operational area. (*Id.*, ¶ 7)

The bridge tender stopped the span and started it back up; however, the Love of My Life hit the span. (Aff. Bowers, ¶ 8) The Love of My Life did not enter the channel of the Bridge, but deviated to the southwest, striking the Bridge. (*Id.*, ¶ 9)

II. ARGUMENT AND CITATIONS OF AUTHORITY

A. CHATHAM COUNTY, GEORGIA IS ENTITLED TO SOVEREIGN IMMUNITY IN AN ADMIRALTY CASE[1].

The County has found no law which states that counties are not entitled to sovereign immunity in an admiralty case.

In *Broward County, Florida v. Wickman*, 195 F.2d 614[2] (5th Cir. 1952), a yacht was damaged after striking an underwater projection that was part of the abutment of a drawbridge owned and operated by Broward County. Suit was brought in personam in admiralty against Broward County. *Id.* Broward asserted that as a political subdivision of the state it was entitled to immunity. *Id.* at 614-615. The Court held that Broward County as a political subdivision of Florida was immune from suit in admiralty. *Id.* at 615 (citing *Ex parte State of New York*, 256 U.S. 490 (1921)).

Chatham County is a political subdivision of the State of Georgia. *Holmes v. Chatham Area Transit Authority*, 234

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[1] Although some case law suggests otherwise, the County assumes that admiralty law applies in this case. *See Efferson v. Kaiser Aluminum & Chemical Corp.*, 816 F. Supp. 1103, 1114 (E.D. La. 1993), stating that an injury that is caused by shore-based equipment or negligence is not within admiralty jurisdiction, even if the injury takes place over navigable water (citing Fifth Circuit case, *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir. 1977)). *See also*, however, 134 ALR Fed 137, § 2 (a) which states that in vessel-bridge collisions, the basic law applicable to admiralty and maritime matters applies.

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Ga. App. 42, 45 (1998); *Thomas v. Hospital Authority of Clarke County*, 264 Ga. 40, 41 (1994); *Wojcik v. State*, 260 Ga. 260, 262 (1990). The County has been delegated power by the State to operate, construct and maintain bridges. Georgia Constitution Article, 9, § 2, ¶ 3(a)(4), authorizes counties to provide for street and road construction and maintenance. Counties are authorized to acquire property for public road purposes. O.C.G.A. § 32-3-1 (a). "Public road purposes" includes bridges. O.C.G.A. § 32-3-1 (b). O.C.G.A. § 32-4-42 sets forth the powers of counties regarding its county road system and refers to public roads. The definition of "public road" includes bridges. O.C.G.A. § 32-1-3 (24)(B).

The County acknowledges that Eleventh Amendment immunity does not extend to counties. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). The Court in *Wickman*, however, had available to it the U.S. Supreme Court case of *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890), which stated that counties are not protected by the Eleventh Amendment from suit in federal court.

It appears that the immunity afforded under *Wickman* is not based on principles of Eleventh Amendment immunity but is based on the universal rule of state immunity from suit without the state's consent. *Wickman*, *supra*; *Ex parte State of New York*, *supra*. The Eleventh Amendment explicitly applies to suits in law or equity, not admiralty. Additionally, *Wickman* is cited in 134 ALR Fed[3] 537, § 2 (b) and 2 Am Jur 2d, Admiralty[4], §51, as authority that the exemption of states

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[3] 134 ALR Fed was published in 1996.

[4] 2 Am Jur 2d, Admiralty, was published in 1994.

from suits in admiralty applies to state subdivisions such as counties.

By contrast, it appears that case law makes a distinction between the liability of counties and cities in admiralty cases because municipal corporations under local charters perform corporate functions in building and operating bridges, and counties exercise delegated state powers and governmental functions in the construction and maintenance of roads and bridges. *See Pelican Marine Carriers, Inc.*, 791 F. Supp. 845, 856 (M.D. Fla. 1992), aff'd without opinion 4 F.3d 999 (11th Cir. 1993), citing a line of cases addressing laws applicable to municipal corporations. *See also* 2 Am Jur 2d, Admiralty, § 51, and 134 ALR Fed 537, § 2 (b).

The County's sovereign immunity derives from the common law which pre-dates Eleventh Amendment immunity. The common law doctrine of sovereign immunity, adopted by the State of Georgia in 1784, protected governments at all levels from unconsented-to legal actions. *Gilbert v. Richardson*, 264 Ga. 744, 745-746 (1994).

Common law sovereign immunity afforded to states does not derive from and is not limited by the Eleventh Amendment. *Alden v. Maine*, 527 U.S. 706, 713 (1999). States have been afforded sovereign immunity before and after the adoption of the Eleventh Amendment. *Id.* The adoption of the Eleventh Amendment was not intended to limit sovereign immunity to the "narrow text of the Eleventh Amendment...." *Id.* at 723-724. *See also Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 753 (2002) ("the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."). The Court in *Alden* stated that sovereign immunity does not extend to lesser entities which are not arms of the state. *Alden*, *supra*, at 756-757. Chatham County as a political subdivision of the State of Georgia, however, enjoys the same sovereign immunity in

this case. *Broward County, Florida v. Wickman*, 195 F.2d 614, 615 (5th Cir. 1952).

B. CHATHAM COUNTY IS ENTITLED TO SOVEREIGN IMMUNITY IN A STATE LAW TORT CASE.

The Court has diversity jurisdiction in a state law tort case. Paragraphs 3 and 4 of the complaint reflect that there is diversity of citizenship. Under the Erie doctrine, a federal court with diversity jurisdiction must apply the substantive law of the state. *Erie R. Co. v. Thompkins*, 304 U.S. 64 (1938).

Ga. Const. Art. 1, § 2, ¶ 9(e) provides:

> "Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can *only* be waived by an Act of the General Assembly which *specifically* provides that sovereign immunity is thereby waived and the extent of such waiver." (emphasis added)

This Constitutional provision, which amended the 1983 Constitution, applies to counties. *Gilbert v. Richardson*, 264 Ga. 744, 746-747 (1994). The County's sovereign immunity can *only* be waived by a *specific act* of the General Assembly. Ga. Const. Art. 1, § 2, ¶ 9 (e); *Gilbert, supra*. This Constitutional provision became effective on January 1, 1991, and therefore applies because the incident at issue occurred on October 6, 2002.

Sovereign immunity "can *only* be waived pursuant to a *legislative act which specifically provides that sovereign immunity is waived and the extent of such waiver.*'" *Woodard v. Laurens County, Ga.*, 265 Ga. 404, 405 (1995) (citing *Gilbert, supra*, at 748). (emphasis added) It cannot be waived by the mere purchase of insurance coverage. *Id.* In *Gilbert*,

the Gilberts sued the Walker County Sheriff. *Gilbert, supra*, at 745. In *Gilbert*, the county's sovereign immunity was waived pursuant to O.C.G.A. § 33-24-51(b) to the extent of the amount of liability insurance *purchased* for the negligence of county officers, agents, servants, attorneys, or employees arising from the use of a motor vehicle and pursuant to O.C.G.A. § 36-85-1 which authorizes counties to participate in GIRMA. *Gilbert, supra*, at 748-749, 751-752.

The County has not waived its sovereign immunity pursuant to any legislative act because it does not participate in GIRMA nor has it purchased any liability insurance for claims arising from the use of a motor vehicle with the exception of insurance coverage for ambulances which was discontinued in 1998. (Aff. Voelker) *See also Woodard, supra*, and *Long v. Hall County Board of Commissioners*, 219 Ga. App. 853, 856-857 (1996). The County does not have any insurance for bridges. (Aff. Voelker)

Although Plaintiff asserts in the joint status report that the General Assembly has waived sovereign immunity for damages caused by county maintained bridges, the County has located no legislative act which waives the County's immunity for the alleged incident involving the Causton Bluff Bridge. *Kordares v. Gwinnett County*, 220 Ga. App. 848, 849-850 (1996).

O.C.G.A. § 32-4-71(b) provides in relevant part that if "the condition of bridge repair authorized by Code Section 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county... ." O.C.G.A. § 32-4-70 (b) provides in relevant part that "[w]here the contract relates to the construction or reconstruction of all or a part of a bridge, the county or counties affected may require the successful contractor to add to the conditions of the per-

formance bond required under paragraph (1) of Code Section 32-4-69 the following condition: to keep the bridge in good condition for a period of not less than seven years." The Causton Bluff Bridge was constructed in 1963 and in the 1980's a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. (Aff. Drewry, ¶ 7) Therefore this provision does not apply.

Plaintiff cannot rely on *Coweta County v. Adams*, 221 Ga. App. 868 (1996). It involved claims that accrued before the effective date of the 1991 amendment to Article 1, § 2, ¶ 9 of the Georgia Constitution. *Id.* at 869. Its holding is limited to its facts and does "not judicially create liability for counties in Georgia for negligence claims relating to bridges... . Under current law, negligent bridge claims are essentially foreclosed by sovereign immunity, and no county liability was created by O.C.G.A. § 32-4-1 *et seq.*" *Id.* (citing *Kordares*, *supra*).

III. CONCLUSION

For the foregoing reasons, the County respectfully requests that the Court grant its motion for summary judgment.

Respectfully submitted this 24th day of November, 2003.

/s/
R. JONATHAN HART
State Bar No. 333692

/s/
EMILY E. GARRARD
State Bar No. 286180

ATTORNEYS FOR CHATHAM
COUNTY, GEORGIA

P. O. Box 8161
Savannah, GA 31412
(912) 652-7881

[EXHIBIT A TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT]

STATE OF GEORGIA)
)
COUNTY OF CHATHAM)

AFFIDAVIT OF ROBERT DREWRY

PERSONALLY APPEARED before the undersigned officer duly authorized by law to administer oaths, ROBERT DREWRY, who, first being duly sworn, deposes and says:

1. This Affidavit is made upon my personal knowledge. I am of legal age and competent to testify to the matters stated herein. I understand that this Affidavit will be utilized in support of Defendant's Motion for Summary Judgment or for such other purposes allowable by law in a lawsuit now pending in the U.S. District Court, Southern District of Georgia, entitled *Zurich Insurance Company, subrogated to the rights of James K. Ludwig and Carol Ludwig v. Chatham County, Georgia*, Civil Action No. CV403-099.

2. I am employed by Chatham County, Georgia ("County") as the Director of Public Works and Park Services. My department is responsible for operating and maintaining the bridges which are owned by the County.

3. Causton Bluff Bridge ("Bridge") is a drawbridge which is owned, operated and maintained by the County. The Bridge is permanently connected to the roadway of Islands Expressway. Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. A copy of an aerial photograph showing the Bridge is attached hereto as Exhibit 1.

4. The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. The Bridge consists of an elevated approach on piles

with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half of the span. The Bridge permits passage of light pleasure craft, tug and tow vessels and commercial vessels over the water of intercoastal waterway of the Wilmington River. The County employs bridge tenders to open the bridge for that purpose. The Bridge is not used as a navigational aid.

5. The County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. There is no charge to anyone for crossing the Bridge. Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. The County derives no income from operating and maintaining the Bridge.

6. The Bridge is not intended to ply the navigable waters of the United States, carrying goods and passengers in commerce. When the spans are lifted or opened to allow water traffic to pass, they are performing a function ancillary to the primary purpose of bridging the distance between the two shores. At such times, the spans remain attached to the permanent piling structure, and carry no passengers or cargo in navigation. The spans do not make contact with the water.

7. Official records maintained in the ordinary course of business in the Public Works and Park Services Department show that the Bridge was constructed in 1963 when the Islands Expressway was constructed as a two-lane roadway. In the 1980's, a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. There has been no additional construction or reconstruction to the Bridge since the 1980's.

Further deponent sayeth naught.

/s/
ROBERT DREWRY (L.S.)

Sworn to and subscribed before me,
this 10th day of November, 2003

/s/
NOTARY PUBLIC

DAWN P. CARTER
Notary Public, Effingham County, GA
My Commission Expires May 9, 2005

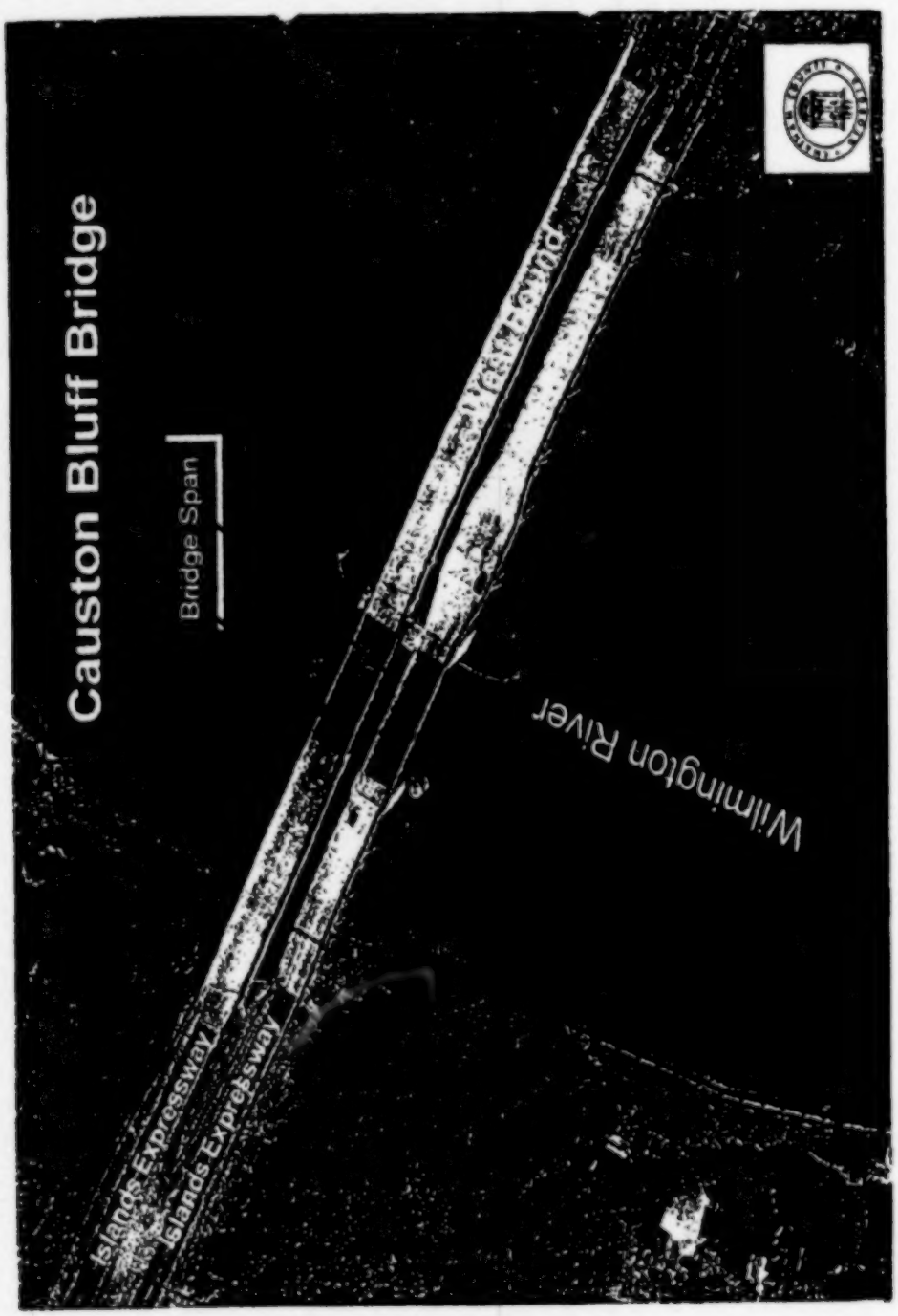

Causton Bluff Bridge
Bridge Span
Wilmington River
Islands Expressway
Islands Expressway

EXHIBIT 1

[EXHIBIT B TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT]

STATE OF GEORGIA)
)
COUNTY OF CHATHAM)

AFFIDAVIT OF WESLEY BOWERS

PERSONALLY APPEARED before the undersigned officer duly authorized by law to administer oaths, WESLEY BOWERS, who, first being duly sworn, deposes and says:

1. This Affidavit is made upon my personal knowledge. I am of legal age and competent to testify to the matters stated herein. I understand that this Affidavit will be utilized in support of Defendant's Motion for Summary Judgment or for such other purposes allowable by law in a lawsuit now pending in the U.S. District Court, Southern District of Georgia, entitled *Zurich Insurance Company, subrogated to the rights of James K. Ludwig and Carol Ludwig v. Chatham County, Georgia*, Civil Action No. CV403-099.

2. I am employed by Chatham County, Georgia ("County") as a bridge tender. I work in the bridges section of the Public Works and Parks Services Department. I sit in the bridge house of County bridges and open the bridges upon request from captains of vessels.

3. On October 6, 2002, James K. Ludwig was traveling in his vessel, the Love of My Life, on the intercoastal waterway of the Wilmington River. On that date, I was the bridge operator of the Causton Bluff Bridge ("Bridge").

4. On October 6, 2002, James K. Ludwig contacted the bridge operator of the Bridge and requested that the Bridge be raised to permit his vessel to transit the waters beneath the Bridge.

5. On October 6, 2002, I opened the Bridge pursuant to Mr. Ludwig's request.

6. I noticed that the north west span of the bridge was drifting down and immediately tried to make radio contact with Captain Ludwig.

7. I was unable to contact the vessel because the Captain turned off his radio prior to entering the Bridge operational area.

8. I stopped the span and started it back up; however, the Love of My Life hit the span.

9. The Love of My Life did not enter the channel of the Bridge, but deviated to the southwest, striking the Bridge.

Further deponent sayeth naught.

/s/
WESLEY BOWERS (L.S.)

Sworn to and subscribed before me,
this 18th day of November, 2003

/s/
NOTARY PUBLIC

PATRICIA A. WASHINGTON
Notary Public, Chatham County, GA
My Commission Expires June 17, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN ADMIRALTY

ZURICH INSURANCE CO. subrogated to the rights of JAMES K. LUDWIG, JR. and CAROL C. LUDWIG,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	No. 403-099
CHATHAM COUNTY, GEORGIA,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THEIR CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiffs move the Court pursuant to F.R.C.P. 56 for a Summary Judgment in favor of Plaintiffs on the ground that there is no genuine issue as to any material fact and Plaintiffs are entitled to Judgment as a matter of law, as more fully appears from the pleadings and affidavits attached hereto.*

CLARK, CLARK & STEINMETZ

/s/
FRED S. CLARK
GA BAR 126800
ATTORNEY FOR PLAINTIFFS

P. O. Box 8151
Savannah, GA 31412
Tel: (912) 233-0300
Fx: (912) 233-9110

* Some of the exhibits are taken from the pleadings in the case of *Rings, et al v. Chatham County*, U.S. District Court Case Number CV403-038. The parties have agreed that the documents used in that case may also be used in the instant case. The Court is permitted to take judicial notice of records and the pleadings in other cases. *National Fire Insurance Company v. Thompson*, 281 U.S. 331, 50 S.Ct. 288, 74 L.Ed. 881.

[EXHIBIT 9 TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT]

Department of Transportation
District Five
Jesup, Georgia 31598

December 16, 1998

MR. JOHN SHUMAN
U.S. CORPS OF ENGINEERS
SAVANNAH DISTRICT OFFICE
POST OFFICE BOX 889
SAVANNAH, GEORGIA 31402

DEAR MR. SHUMAN:

I HAVE RECEIVED A COPY OF A FAX FROM MR. LARRY SEABROOK, DIRECTOR OF OPERATIONS WITH THE GEORGIA DEPARTMENT OF TRANSPORTATION, THAT YOU SENT HIM IN REFERENCE TO A PROBLEM WITH THE SAM VARNEDOE BRIDGE ON THE WILMINGTON RIVER. SPECIFICALLY, MR. PETE W. TUCKER HAS EXPRESSED HIS CONCERN THAT THE BRIDGE WAS NOT OPENED ON REQUEST ON DECEMBER 1, 1998.

PLEASE BE ADVISED THAT THIS STRUCTURE IS ON PRESIDENT STREET AND IS OPERATED BY CHATHAM COUNTY AND NOT THE GEORGIA DEPARTMENT OF TRANSPORTATION.

I AM FORWARDING A COPY OF THE CORRESPONDENCE TO THE CHATHAM COUNTY ENGINEER, WITH WHOM YOU MAY WANT TO FOLLOW UP WITH, CONCERNING THIS MATTER.

YOURS VERY TRULY,
/S/
GARY D. PRIESTER
DISTRICT ENGINEERS

GDP:cah

CC: MR. LARRY SEABROOK, DIRECTOR OF OPERATIONS – D.O.T.
MR. AL BUNGARD, P.E., CHATHAM COUNTY ENGINEER -
W/ATTACHMENT
MR. PETE TUCKER, CAPTAIN, FOURTH QUARTER

[EXHIBIT 10 TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN ADMIRALTY

CASE NO.: CV-403-038

DENNIS K. RINGS, U.S. BOATS, and CONTINENTAL CASUALTY COMPANY

-Plaintiffs, *

Verse *

CHATHAM COUNTY, GEORGIA * and the Georgia Department of Transportation *

-Defendant *

_____ /

DENNIS K. RINGS, U.S. BOATS, and CONTINENTAL CASUALTY COMPANY
SECOND SET OF REQUESTS FOR ADMISSION TO CHATHAM COUNTY, GEORGIA

COMES NOW, DENNIS K. RINGS, U.S. BOATS, and CONTINENTAL CASUALTY COMPANY, through undersigned counsel, pursuant to the Federal Rules of Civil Procedure and the Local Rules for the Southern District of Georgia, Savannah Division, and respectfully submits the following Requests for Admission to Chatham County.

1. Please admit that Chatham County, Georgia was the party that submitted the proposal and/or proposed plans for the Causton Bluff Bridge to the United States Army Corp of Engineers.

2. Please admit that Chatham County, Georgia was the party that submitted the proposal and/or proposed plans or the second span of the Causton Bluff Bridge to the United States Army Corp of Engineers.

3. Please admit that the United States Coast Guard is responsible for regulating the operation of (a) obstructions to navigations; (b) bridges over navigable waters in general and (c) the Causton Bluff Bridge.

4. Please admit that 33 C.F.R. §117.353(b) mandates when the bridge must open and close in order to permit navigation of the waterways beneath the Causton Bluff Bridge.

5. Please admit that 33 C.F.R. §117.353(b) requires the Causton Bluff Bridge to open on signal, except that from 6:30 a.m. to 9 a.m. and 4:30 p.m. to 6:30 p.m. Monday through Friday, except Federal holidays the draw need open only at 7:a.m., 8 a.m, and 5:30 p.m.

6. Please admit that Dennis K. Rings contacted the bridge operator on December 8, 2000 and requested that the bridge be raised to permit his vessel, the S/V MOXSUN to transit the waters beneath the Causton Bluff Bridge.

7. Please admit that the Causton Bluff Bridge was opened in response to Mr. Ring's December 8, 2000 request.

8. Please admit that while Mr. Ring's vessel, S/V MOXSUN, was passing beneath the Causton Bluff

Bridge, it was struck by the descending draw or span of the Causton Bluff Bridge.

9. Please admit that as a result of the Causton Bluff Bridge striking the S/V MOXSUN, the vessel sustained physical damage.

10. Please admit that the physical damage sustained by the S/V MOXSUN on December 8, 2000 was the result of the lowering bridge span striking the mast of the S/V MOXSUN.

11. Please admit that composite exhibit "A" establishes that $75,589.03 has been paid in this matter by Continental Insurance Company to Mr. Rings or to venders performing repairs to his vessel.

12. Please admit that Continental Insurance Company is subrogated to Mr. Ring's rights to recover $75,589.3 plus interest for the losses sustained by Mr. Rings' vessel.

13. Please admit that any judgment against Chatham County, in this matter, would not be satisfied by funds received:

    a) from the State of Georgia as part of general revenue funds provided to the county;

    b) from the State of Georgia as part of funds which are directly earmarked for the payment of this judgment;

    c) from the State of Georgia as part of funds which are earmarked for the payment judgments in general.

14. Please admit that Chatham County, Georgia made payments in excess of $30,000.00 directly to certain vendors performing repairs to the S/V MOXSUN between December 1, 2000, and the current date.

15. Please admit that these payments were made on a voluntary basis and not as a result of any judgment issued against Chatham County, Georgia.

16. Please admit for each time period below that the money which Chatham County spent on maintenance of, and repairs to, the Causton Bluff Bridge was not allocated from funds which Chatham County originally received from the State of Georgia.

    a) from 1995-2000; and

    b) from 2000 until the present.

17. Please admit that these repairs were being performed in connection with damage sustained when the Causton Bluff Bridge struck the mast or rigging of the S/V MOXSUN.

18. Please admit that Chatham County, Georgia was received no funds from the State of Georgia which were designated for the operations, maintenance or repair of the Causton Bluff Bridge.

[EXHIBIT 10 TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

CONTINENTAL INSURANCE COMPANY, Subrogated to the rights of DENNIS K. RINGS,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. CV 403-038
CHATHAM COUNTY, GEORGIA,	)	
Defendant.	)	

CHATHAM COUNTY, GEORGIA'S RESPONSES TO PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS

NOW COMES CHATHAM COUNTY, GEORGIA ("County"), pursuant to Fed. R. Civ. P. 36, and responds to Plaintiff's second request for admissions.

1. Denied. By way of further answer, the County states that the first span of the Causton Bluff Bridge was constructed circa 1964. Additionally, the design work was performed by the Georgia Department of Transportation.

2. Denied. By way of further answer, the County states that the second span was designed and installed by the Georgia Department of Transportation and was turned over to the County upon completion.

3. Upon information and belief, admitted. By way of further answer, the County states that counsel has searched for the statutes or regulations for confirmation of the matters requested to be admitted in this paragraph and has not located the applicable provisions.

4. Admitted.

5. Admitted. By way of further answer, the County states that the restricted hours are correct with the exception that an opening will be granted for a vessel waiting at the bridge at 7:00 a.m., 8:00 a.m. and 5:30 p.m. or for a government vessel or tug and tow.

6. Admitted.

7. Admitted.

8. Denied in part. By way of further answer, the County states that the span was drifting and struck the S/V Moxsun.

9. Denied in part. By way of further answer, the County states that the S/V Moxsun sustained physical damage when the drifting span of the Causton Bluff Bridge struck the S/V Moxsun.

10. Denied in part. By way of further answer, the County states that the S/V Moxsun sustained physical damage when the drifting span of the Causton Bluff Bridge struck the mast of the S/V Moxsun.

11. The County cannot admit Request for Admission 11. The County has made reasonable inquiry and the information known or readily obtainable by the County is insufficient to enable the County to admit or deny. The documents provided do not clearly reflect that the payments were made for repairs to Plaintiff's boat.

12. The County cannot admit Request for Admission 12. The County has made reasonable inquiry and the information known or readily obtainable by the County is insufficient to

enable the County to admit or deny. The County has served additional discovery to obtain further information.

13. Admitted.

14. Admitted. By way of further answer, the County states that on January 12, 2001, a payment in the amount of $7,170.50 was made to Ortego River Boat Yard, 4451 Herschel Street, Jacksonville, Florida 32210 and on this same date, a payment in the amount of $28,379.15 was made to Cambridge Sail Loft and Rigging, 6610 Lennox Avenue, Jacksonville, Florida 32205.

15. Admitted.

16. Admitted.

17. Denied. By way of further answer, the County is unclear if the information requested is for the repairs to the Moxsun or to the Causton Bluff Bridge.

18. Admitted.

This 11th day of September, 2003.

/s/
R. JONATHAN HART
State Bar No. 333692

/s/
EMILY E. GARRARD
State Bar No. 286180
ATTORNEYS FOR DEFENDANT

P. O. Box 8161
Savannah, GA 31412
(912) 652-7881

[ATTACHMENT TO DEFENDANT'S SUPPLEMENTAL AUTHORITY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CONTINENTAL INSURANCE COMPANY,
subrogated to the rights of
DENNIS K. RINGS,

Plaintiff,

v. 403CV038

CHATHAM COUNTY, Georgia

Defendant.

ORDER

I. INTRODUCTION

Plaintiffs Dennis K. Rings and his insurer, Continental Insurance Company ("CIC," on subrogation) bring this *in personam* vessel-damages admiralty action against Chatham County, Georgia, an intercoastal waterway draw bridge owner/operator. Doc. # 1. The County concedes that when it raised its bridge one of its bridge spans struck and damaged Ring's vessel while it passed beneath, but moves for summary judgment on sovereign immunity grounds. Doc. # 25. Plaintiffs move for summary judgment against the County, insisting that no such immunity applies and that the County's negligence supports their recovery. Doc. # 21.

II. BACKGROUND

The County owns and operates the "Causton Bluff Bridge," which is part of a multi-lane public road connecting Savannah, Georgia with outlying islands. Doc. # 16 exh. A ¶¶ 3-5. The taxpayer-funded, non-revenue collecting/generating bridge crosses over an intercoastal waterway. *Id.*

Emphasizing that taxpayers pay to maintain/operate the bridge and that it collects no revenue from it, the County insists it exercised delegated State power while operating the bridge on the day it damaged Rings's vessel. Doc. # 18 at 2; # 16 ¶¶ 3-6. Mindful that counties have been held to have waived sovereign immunity to the extent they have purchased insurance, the County also points out that it has no insurance for bridge mishaps. Doc. # 16 exh. C.

III. ANALYSIS

A. Sovereign Immunity

The County is "*not* asserting sovereign immunity based on the Eleventh Amendment immunity,"[1] doc. # 25 at 1 (emphasis added), a defense a Florida county unsuccessfully invoked in *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1313-

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[1] The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. *See U.S. v. Texas Tech Univ.*, 171 F.3d 279, 285 n. 9, 288 (5th Cir. 1999) (Eleventh Amendment immunity deprives court of subject matter jurisdiction); *id.* at 285 ("While often noted for preserving state sovereignty, the Amendment only accomplishes this end through jurisdictional limitation").

15 (11th Cir. 2003). Rather, it raises "common law" sovereign immunity illuminated in *Gilbert v. Richardson*, 264 Ga. 744, 745-46 (1994) and *Federal Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002) ("FMC"). *Id.* at 2-3.

Retracing the *pre*-Eleventh Amendment, "none-can-sue-the-king" sovereign immunity in *FMC*, that court characterized it as "residual and inviolable sovereign immunity." 535 U.S. at 570 (quotes and cite omitted). States, that court explained, ceded to the federal government (under Article I of the U.S. Constitution) only so much of their sovereignty as was necessary to form the United States of America. *Id.* at 572. Hence, "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Alden v. Maine*, 527 U.S. 706, 712 (1999).

But this sovereign immunity was placed "into peril" when *Chisholm v. Georgia*, 2 Dall. 419 (1793), held that Article III of the Constitution authorized citizens of one State to sue another in federal court. *FMC*, 535 U.S. at 752. Congress and the States overturned *Chisholm* by passing the Eleventh Amendment. *See supra* note 1.

In choosing that Amendment's text, Congress did not "explicitly memorializ[e] the full breadth of the sovereign immunity retained by the States," but chose only "to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision." *FMC*, 535 U.S. at 753 (quotes and cite omitted).

Otherwise, "the sovereign immunity enjoyed by the States extends *beyond* the literal text of the Eleventh

Amendment." *Id.* at 754 (emphasis added).[2] The Eleventh Amendment was passed simply to restore the original constitutional design (*i.e.*, States were to retain their residual sovereign immunity and thus could not be sued in any court absent their consent). *Alden*, 527 U.S. at 713-30.

The *FMC* court held that State sovereign immunity bars the Federal Maritime Commission from adjudicating complaints filed by a private party against a nonconsenting State. *Id.* at 769. In other words, the State's sovereign immunity in that case precluded the Federal Maritime Commission from adjudicating a private party's complaint that the State-run port had violated the Shipping Act of 1984. *Id.* Absent its consent, then, a State cannot be "sued" in an agency tribunal, either.

It should be no surprise, then, that "the immunity of a State from suit *in personam* in the admiralty brought by a private person without its consent is clear." *Ex Parte State of New York*, 256 U.S. 490, 500 (1921), *reaffirmed in FMC*, 535 U.S. at 754, 767.[3]

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[2] Too, the Supreme Court has strengthened State sovereign immunity in recent years. See *Alden*, 527 U.S. at 712 ("the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state court"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (Congress lacks power under Article I to abrogate States' sovereign immunity from suits commenced or prosecuted in federal courts).

[3] "While [such] immunity from suit is not absolute, the Supreme Court has recognized only two situations where an individual may sue a state: where suit is authorized by Congress in the exercise of its power to enforce the Fourteenth Amendment, and where a state has waived its sovereign immunity by consenting to suit." 2 MODERN TORT LAW: LIABILITY AND LITIGATION § 16:6 n. 1 (*State*

[Footnote continued on next page]

Here the County insists that it is a political subdivision of the State, so the Court should deem it immune under the above reasoning, as well as that set forth in *Broward County, Fla. v. Wickman*, 195 F.2d 614 (5th Cir. 1952) (A Florida county, as a political subdivision of State, was immune in absence of consent from suit in admiralty for damages which resulted when yacht struck an underwater projection which was part of abutment of drawbridge, owned by county, through which yacht was passing). Doc. # 25 at 3.

The *Broward County* court did not cite the Eleventh Amendment, but did cite *New York* and *Workman v. City of New York*, 179 U.S. 552, 570 (1900), to conclude that a Florida county which owned/operated a public bridge using power delegated from the State enjoyed sovereign immunity *from admiralty process*, 195 F.2d at 615, which is functionally the same as saying "immune from admiralty suit."

The result there was not, that court pointed out, inconsistent with *Workman*'s holding that State immunity law could not trump substantive admiralty law over New York City, where "it was *assumed* that the City ... was subject to admiralty process." *Id.* (emphasis added). Thus, although it did not expressly say so, the *Broward County* court applied "residual sovereign immunity" to immunize Broward county from the admiralty claims there.

[Footnote continued from previous page]

Governmental Immunity—in General) (2d ed. Aug. 2003). Otherwise, "Congress lacks power under Article I to abrogate states' sovereign immunity from suits commenced or prosecuted in federal court.... [It also] lacks power under Article I to subject a nonconsenting state to private suits for damages in its own courts as well." *Id.* § 16.6.

At the same time, that court respected the rule, emanating from prior Supreme Court precedent, that where a city or some other municipal entity is otherwise before an admiralty court, admiralty law will preempt State immunity or limitation laws. 195 F.2d at 615.[4]

B. "Part of the State"

The bottom line, then, is this: Whatever government entity is being sued, the first line of inquiry is whether it may be deemed a part of the State (a subdivision, agency, etc., exercising actual or delegated State power). If it can be so deemed, then that defendant may invoke residual sovereign immunity, of which Eleventh Amendment immunity may be viewed as a mere subset. *See Principe Compania Naviera, S. A. v. Bd. of Comm'rs of Port of New Orleans*, 333 F. Supp. 353, 354-56 (E.D. La. 1971) (Under Eleventh Amendment, court does not have jurisdiction to entertain a suit in admiralty against state or state agency which is an *integral part* of the state government; so, admiralty actions against *counties*,

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[4] *Workman* is thus best viewed as a preemption (*i.e.*, federal admiralty law preempts conflicting state law) case:

> Thus, state laws which defeat existing maritime rights or enlarge existing maritime liabilities are traditionally preempted. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 741-42 (1961) (state statute of frauds may not be applied to defeat maritime breach of contract claim); *see also State of Md. Dept. of Natural Resources v. Kellum*, 51 F.3d 1220, 1226-28 (4th Cir. 1995) (applying admiralty preemption doctrine to prevent application of state statute that purported to increase the existing standard of care under maritime law in certain maritime tort actions).

Great Lakes Dredge and Dock Co. v. City of Chicago, 1996 WL 210081 at * 1 (N.D. Ill. 1996) (unpublished).

municipalities and other lesser governmental agencies and corporations which have an existence independent of state are not within the Eleventh Amendment's purview; since board of commissioners of the Port of New Orleans is not the state of Louisiana, the Eleventh Amendment did not bar invocation of admiralty jurisdiction in a shipowner's action against the Board for a maritime tort); *J. Ray McDermott & Co. v. Dep't of Highways, State of La.*, 267 F.2d 317, 318 (5th Cir. 1959) (applying "residual sovereign immunity" only -- hence, not Eleventh Amendment immunity -- to hold that State highway department could not be made to stand in judgment in a tort action in admiralty arising out of collision of libellant's barges with a bridge on a highway maintained by the department since the department is a department of the state which has not given its consent to be sued).

If the entity in question is not part of the State, then it does not matter if it claims to have been exercising a "governmental function." It remains amenable to *in personam* admiralty process and thus may be recovered against in admiralty court. To summarize:

> The rule of nonliability for torts where a *municipality* [*i.e.*, a city, not necessarily a county] is exercising a purely governmental function is *not* enforced in the admiralty courts. The United States Supreme Court has held [in *Workman*, 179 U.S. at 570] that "in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction." [*Id.*] The United States Supreme Court has announced the doctrine that for every maritime tort there is redress if the admiralty court has jurisdiction of the offending person or

> thing. [In contrast,] *a quasi-municipal corporation, if immune from process in the state, would be immune from process in a suit in admiralty for a maritime tort.*

18 MCQUILLIN MUN. CORP. § 53.25 (3rd ed. Aug. 2003) (footnotes omitted; emphasis added); *Michaeledes v. Golden Gate Bridge, Highway and Transp. Dist.*, 202 F. Supp. 2d 1109, 1110 (N.D. Cal. 2002) ("[i]t has long been settled that a federal court exercising admiralty jurisdiction must respect a *state*'s sovereignty") (emphasis added) (citing *New York*, 256 U.S. at 497-500; (1921); *Workman*, 179 U.S. at 566).

Sovereign-immunity determining courts, then, typically inquire whether the governmental entity being sued was exercising power delegated from the State, as opposed to acting in proprietary way (like a private corporation that constructs a bridge and charges tolls):

> Not all public entities are possessed of the attributes of sovereignty that the state possesses. Lower courts are to determine a public entity's sovereignty "not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." *In re New York*, 256 U.S. at 500, 41 S.Ct. 588. *See also Workman*, 179 U.S. at 570, 573-74, 21 S.Ct. 212 (city is not a sovereign and may be sued in admiralty despite state law holding city immune from such suits).

Michaeledes, 202 F. Supp. 2d at 1111. Substance trumped nomenclature in *Michaeledes* because the action there in fact was against "'a municipal corporation or other governmental entity which is not an arm of the State.'" *Id.* (quoting *Alden*, 527 U.S. at 756); *see also id.* at 1112-13 (Golden Gate Bridge, Highway and Transportation District, although a "public entity" under California Tort Claims Act, was *not* an

"arm of the state" entitled to assert sovereign immunity defense against injured employee's federal-court unseaworthiness claim; there was no evidence that judgment against District would be enforceable against state and no evidence that state exercised any decision-making authority for District or had any supervisory responsibility for District).

The issue at this juncture, then, is whether Chatham County has acted as a proprietary bridge operator or as an arm of the State. Under the narrower slice of sovereignty preserved by the Eleventh Amendment, case law allows county sheriff departments exercising State power to switch (county versus State) hats to invoke *Eleventh Amendment* immunity, depending on which sort of power they exercise:

> In Eleventh Amendment cases, this Court uses four factors to determine whether an entity is an "arm of the State" in carrying out a particular function: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity.

Manders v. Lee, 338 F.3d 1304, 1309 (11th Cir. 2003); *accord Vierling*, 339 F.3d at 1314 ("Thus, when an action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit") (quotes and cite omitted).

But *Manders* and *Vierling* focused on the narrower, Eleventh Amendment immunity,[5] not the broader swath of

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[5] Again, the County is *not invoking* the Eleventh Amendment, except in the sense that it may be viewed as a subset of residual sovereign immunity (though, as noted *supra* note 1, that Amend-

[Footnote continued on next page]

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ment also is viewed as an express, federal-court-jurisdiction-limiting response to *Chisholm*).

In any event, the Court acknowledges precedent showing that defendants invoking Eleventh Amendment immunity must prove its applicability. *Chisolm v. McManimon*, 275 F.3d 315, 323 (3d Cir. 2001). In contrast to "residual sovereign immunity," that ordinarily takes some doing. *See Vierling*, 339 F.3d at 1314-15; *Grimshaw v. South Florida Water Management Dist.*, 195 F. Supp. 2d 1358, 1363-65 (S.D. Fla. 2002) (Regional water management district was arm of State of Florida entitled to Eleventh Amendment immunity; Florida legislature defined districts as operating under state control to perform state function with regional component, Florida exercised virtually absolute control over district's personnel, budget, policies and operations, Florida provided substantial portion of district's funds and exercised budget item control over all its resources, and, as practical matter, state's treasury was directly implicated by any judgment against district, both through budget and importance to State's future of maintaining financial viability of district).

Here, unsurprisingly, the County cites little compared to the water-management district's showing in *Grimshaw*. It points out that "taxpayer" dollars fund the bridge, doc. # 17 at 1-2, but does not indicate whether *State* versus *County* tax dollars are used (though, the State does authorize it to collect taxes). It also points out that Georgia law authorizes counties to provide for road construction and maintenance, acquire property for both roads and bridges, and thus exercise State delegated powers and governmental functions in constructing and maintaining roads and bridges. *Id.* at 5. But in contrast to what was shown in *Grimshaw*, it does not say much with respect to the degree of control the State exercises over it. In a later brief, the County basically just points to Georgia law showing that it is cloaked in the State's residual sovereign immunity until waiver is shown. Doc. # 25.

residual sovereign immunity *FMC* illuminated.[6] In the latter cases, Georgia courts scrutinize the overall intent and contour of the county entity, along with the stream of State power in which it navigates. "[T]here are a number of decisions holding," for example, Georgia

> county departments of family and children services [DFACS] to be instrumentalities of the state for other purposes. *See Horne v. Skelton*, 152 Ga.App. 654, 655(1), 263 S.E.2d 528 (county department of family and children services found to be an instrumentality of the state when power to appoint county director by the commissioner of DHR involved); *Employees Retirement System of Ga. v. Baughman*, 241 Ga. 339, 245 S.E.2d 282 (DFACS employees are state employees for the purpose of determining retirement benefits); and *Ga. Dept. of Human Resources v. Demory*, 138 Ga.App. 888, 227 S.E.2d 788 (DFACS determined to be a state instrumentality distinct from Hall County Board of Health, a county instrumentality, for purposes of workers' compensation). *Also see Bendiburg v. Dempsey*, 707 F. Supp. 1318 (N.D. Ga.1989) (DFACS is instrumentality of the state for the purpose of Eleventh Amendment immunity).

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[6] Where residual sovereign immunity is shown, incidentally, Georgia courts place the burden on those opposing it to show that it has been waived. *CSX Transp., Inc. v. City of Garden City, Georgia*, 196 F. Supp. 2d 1288, 1293 n. 5 (S.D. Ga. 2002), *aff'd in part and remanded for further proceedings*, ___ F.3d ___, 2004 WL 49117 (11th Cir. 1/12/04).

Floyd County Grand Jury v. Dept. of Family & Children Servs., 218 Ga.App. 832, 834 (1995); *compare Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir. 1990) (School board in Alabama county was not arm or alter ego of state, for Eleventh Amendment immunity purposes).

Floyd County's holding is consistent with the Georgia State government's basic contours; counties are geographical subdivisions administering (as do the County police, for example) State-delegated (called "Home rule" and "Supplementary") powers at the county (local) level. *See Gilbert*, 264 Ga. at 747; Ga. Const. 1983, as amended 1991, Art. 9, § 1 ¶¶ 2-3. Counties, then, by power-decentralizing *design*, are political subdivisions of the State entitled to the same sovereign immunity as the State when they exercise State power.

Plaintiffs do not dispute that Georgia's constitution extends sovereign immunity to the state, its departments, agencies and also its counties. *Gilbert*, 264 Ga. at 747. Nor do they dispute that counties exercise State power to acquire land and build/operate roads and bridges. *See* O.C.G.A. § 32-4-92 (preamble) (enumerating State's delegation of its powers to a county with respect to county road systems); *id.* § 32-4-92(3)(A) (counties may exercise the State's power to condemn land for roads); *id.* § 32-4-92(8) & (11) (county can exercise the State's power to tax for roadbuilding/maintenance purposes); § 32-4-70 - § 32-4-71 (governing county authority to construct, reconstruct and repair bridges, payment bonds for same); *see also* § 32-4-90 *et seq.* (delegation of State power to municipalities for municipal street systems, including bridges).

The County, in acquiring the land and constructing/operating the public highway and bridge in question, exercised that very State power. And its mere act of building/operating roads and bridges does not waive its sovereign immunity. *See Kordares v. Gwinnett County*, 220 Ga.App.

848, 849-50 (1996) (County was protected by sovereign immunity from negligence claim arising from death of decedent who was killed when he attempted to cross county bridge, and bridge partially collapsed).[7]

Indeed, courts more or less *presume* that when a county exercises State power (*e.g.*, police power) the State's sovereign immunity extends to it until the challenging party shows otherwise (*e.g.*, that the county waived its sovereign immunity by purchasing insurance). *See Smith v. Chatham County*, ___ Ga.App. ___, 2003 WL 22700904 at * 1 (11/17/03) (County had not purchased liability insurance for damages arising from negligence of duly authorized officer in performance of his official duties, and thus, county did not waive sovereign immunity from liability for injuries sustained by motorists when truck pursued by police officers

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[7] This is not a new concept. *See Mann v. County, Bd. of Arlington County*, 98 S.E.2d 515, 518 (Va. 1957) (Even though Arlington County had taken on characteristics of city and exercised many powers and performed many services customarily rendered by municipal corporations, and even though it had elected to operate its own system of roads, nevertheless "[i]n Virginia, territorially and politically, counties are integral parts of the State," so the county could not be held liable for injuries sustained by a pedestrian when an automobile crossed the curbing between a parking area and a sidewalk and crushed the pedestrian against a store front, allegedly as a result of the county's negligence in maintaining a parking area immediately adjacent to the sidewalk and in permitting motor vehicles to be parked perpendicular to the curb without stanchions or other safeguards to prevent their entering upon the sidewalk), cited in 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 399 (May 2003) ("[T]he view has been followed that, in the absence of statutory authorization, counties are generally not liable for injuries to persons or property caused by defects in their highways, streets, and bridges") and *id.* § 120.

collided with motorists' vehicle)[8]; *Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir. 1993) ("The state of Georgia is immune to suit for any cause of action unless sovereign immunity is expressly waived by constitutional provision or statute. This sovereign immunity extends to counties, as subdivisions of the state").

Here the County has no immunity-waiving insurance, and plaintiffs have not otherwise shown that the State or County waived the County's sovereign immunity. Nor is the County otherwise before the Court but attempting to invoke an admiralty-preempted State statute aimed at defeating or impinging admiralty law. *See supra* note 4.

IV. CONCLUSION

Accordingly, the Court ***GRANTS*** Chatham County, Georgia's motion for summary judgment (doc. # 16, *as amended*, doc. # 24), ***DENIES*** plaintiffs' motion for summary judgment (doc. # 21) and ***DISMISSES*** plaintiffs' Complaint ***WITH PREJUDICE***.

This 14th day of January, 2004.

/s/

B. AVANT EDENFIELD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

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[8] There the court noted that

> [t]he doctrine of sovereign immunity protects governments from legal action unless they have waived their immunity from suit. The immunity, at least for counties, may only be waived by a legislative act which specifically provides that sovereign immunity is waived and the extent of such waiver.

2003 WL 22700904 at * 1 (footnote omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

Case No.: CV403-99

ZURICH INSURANCE COMPANY,

Plaintiff,

vs.

CHATHAM COUNTY, GEORGIA,

Defendant.

ORDER

Before the Court is Defendant's Motion for Summary Judgment (Doc. 10), Plaintiff's Motion for Summary Judgment (Doc. 16), and Plaintiff's Motion to Strike (Doc. 14). After careful consideration, the Court **GRANTS** Defendant's motion for summary judgment and **DENIES** Plaintiff's motion for summary judgment and motion to strike.

BACKGROUND

This case arises out of an accident that occurred on October 6, 2002, when James K. Ludwig attempted to transverse the Causton Bluff Bridge ("Bridge"). The Bridge is a drawbridge that is owned, operated and maintained by Chatham County, Georgia. It is permanently connected to the Islands Expressway, a public road maintained by Chatham County, which connects the City of Savannah with Whitemarsh, Wilmington, and Tybee Islands.

The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half of the span. The Bridge permits passage of light pleasure craft, tug and tow vessels, and commercial vessels over the water

of the intercoastal waterway of the Wilmington River. The County employs bridge tenders to open the Bridge for that purpose.

On October 6, 2002, Ludwig was in his vessel, "the Love of My Life," ("the Vessel") which is insured by Plaintiff Zurich Insurance Company. As he approached the Bridge, Ludwig contacted the bridge tender and requested that the Bridge be raised to permit his transit. At that time, the bridge tender opened the Bridge, pursuant to Ludwig's request, but soon noticed that, the northwest span of the Bridge was drifting down. Immediately, the bridge tender attempted to make radio contact with Ludwig to warn him of the Bridge's disfunction, but Ludwig had turned off his radio before entering the Bridge operational area. The Bridge tender stopped the span of the Bridge that was drifting down and started to raise it back up. However, the Vessel hit that span, then deviated to the southwest, striking the Bridge. As a result of the accident, $78,980.50 worth of damage was incurred on the Vessel. Plaintiff incurred additional expenses, all totaling $137,987.69.

On June 2, 2003, Plaintiff filed its Complaint in this Court asserting three counts: (1) negligence, (2) maintenance of a continuing nuisance, and (3) statutory and/or regulatory fault for violation of the navigable servitude encompassed by the U.S. Coast Guard and U.S. Corps of Engineers Permits. On November 24, 2003, Defendant filed the motion for summary judgment now before the Court, claiming that Plaintiff's claims are barred by the doctrine of sovereign immunity. On December 16, 2003, Plaintiff filed its response to Defendant's motion, as well as its own cross motion for summary judgment. Defendant filed a response to Plaintiff's motion on December 29, 2003.

Plaintiff filed its motion to strike on December 16, 2003, seeking to strike the affidavit of Robert Drewry contained in

Defendant's Motion for Summary Judgment. Defendant filed its response on December 29, 2003.

ANALYSIS

I. Standard of Review

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56 (c). The "purpose of summary, judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (quoting Fed. R. Civ. P. 56 advisory committee's note). Summary judgment is appropriate when the nonmovant "fails to make a showing, sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Tidmore Oil Co. v. BP Oil Co. /Gulf Prods. Div., a Div. of BP. Oil Co.*, 932 F.2d 1384, 1387-88 (11th Cir. 1991). The substantive law governing the action determines whether an element is essential. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *DeLong Equip. Co. v. Washington Mill Abrasive Co*, 887 F.2d 1499, 1505 (11th Cir. 1989).

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. The burden then shifts to the nonmovant to establish, by going beyond the pleadings, that there is a

genuine issue as to facts material to the nonmovant's case. *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1583 n.16 (11th Cir. 1991); *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991). A dispute of material fact "is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248, 106 S. Ct. at 2510. However, if the nonmoving party's response to the, summary judgment motion consists of nothing more than mere conclusory allegations, then the court must enter summary judgment in the moving party's favor. *Pepper v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, [then] there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356; *see also Liberty Lobby*, 477 U.S. at 252, 106 S. Ct. at 2512; *Johns v. Jarrard*, 927 F.2d 551, 556 (11th Cir. 1991).

In assessing whether the movant is entitled to summary judgment in its favor, the district court must review the evidence and all reasonable factual inferences arising from it in the light most favorable to the nonmoving party. *Welch v. Celotex Corp.*, 551 F.2d 1235, 1237 (11th Cir. 1992); *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991). The Court must avoid weighing conflicting evidence. *Liberty Lobby*, 477 U.S. at 255, 106 S. Ct. at 2513; *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 934 (11th Cir. 1987). A mere "scintilla" of evidence supporting the opposing party's position, however, will not suffice. *See, e.g., Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). Nevertheless, where a reasonable fact finder may "draw more than one inference from the facts, and that inference creates a genuine issue of, material fact, then the court should refuse to grant summary judgment." *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989) (citation omitted). In light of this standard, the Court will now address the parties' arguments for summary judgment.

II. Defendant's Motion for Summary Judgment

Defendant contends that summary judgment should be granted in its favor on Plaintiff's claims because it is entitled to sovereign immunity The Eleventh Circuit Court of Appeals recently held in *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1313-15 (11th Cir. 2003), that a Florida county is not entitled to a defense of immunity based on Eleventh Amendment Sovereign immunity).[9] . However, Defendant asserts as the source of its immunity, not the Eleventh Amendment, but a "residual sovereign immunity" that arises from common law. *See Gilbert v. Richardson*, 264 Ga. 744, 745-46 (1994); *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753,122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002).

The Eleventh Amendment is a Congressional response to the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. 419 (1793), which held that "Article III of the Constitution authorized citizens of one State to sue another State in federal court." *Fed. Maritime*, 535 U.S. at 752, 122 S. Ct. at 1870. The adoption of the Eleventh Amendment effectively overturned *Chisolm*'s holding. However,

> [instead] of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh

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[9] The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

> Amendment only to 'address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the Chisholm decision.' As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity.

Id. at 753, 122, S. Ct. at 1871 (quoting *Alden v. Maine*, 527 U.S. 706, 723, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)) (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991)).

This case does not involve a state, but rather a county. If Plaintiff were attempting to sue the State of Georgia, the question of the state's sovereign immunity would be clear. *See Fed. Maritime*, 535 U.S. at 760, 122 S. Ct. at 1875 (holding that, a state cannot be subject to suit in the Federal Maritime Commission because of its substantial similarity to an Article III Court). The pertinent issue before the Court then is whether the County is entitled to the same immunity as the state.

According to Defendant, it is entitled to the protection of sovereign immunity because it is a political subdivision of the State of Georgia. In support of its argument, Defendant cites *Broward County, Fla. v. Wickman*, 195 F.2d 614 (5th Cir. 1952),[10] which, involved a suit, in admiralty for damages resulting from an accident in which a yacht struck an underwater projection that was part of the abutment of a

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[10] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

county-owned drawbridge. In that case, the Fifth Circuit held that the county, as a political subdivision of the state, was immune from suit.

In support of its holding, the Fifth Circuit relied on two cases, *Ex Parte State of New York*, 256 U.S. 490, 500 (1921), and *Workman v. City of New York* 179 U.S. 552, 570 (1900), and concluded that a Florida county that owned and operated a public bridge using power delegated to it from the state enjoyed sovereign immunity from admiralty process, the functional equivalent of being immune from an admiralty suit altogether. *Wickman*, 195 F.2d at 615. In *Wickman*, the circuit court based its decision not on the immunity provided by the Eleventh Amendment, but on the state's residual sovereign immunity. *Cont'l Ins. Co. v. Chatham County*, No. CV403-38 (S.D. Ga. Jan. 14, 2004) (order granting summary judgment). When a city or other municipal entity is not exercising power delegated from the state, however, the *Wickman* court acknowledged that sovereign immunity would not be available. *Wickman*, 195 F.2d at 615.

The issue then becomes whether, in this case, the County may be deemed part of the state, either by having exercised power delegated from the state, or because it is a political subdivision of the state. If the County is deemed part of the state, then it may invoke residual sovereign immunity. *See Principe Compania Naviera, S.A. v. Bd. of Comm'rs of Port of New Orleans*, 333 F. Supp. 353, 354-56 (E.D. La. 1971) (recognizing residual sovereign immunity to protect a "sovereign or a party with sovereign attributes"); *J. Ray McDermott & Co. v. Dent of Highways, State of La.*, 267 F.2d 317 (5th Cir. 1959) (affirming lower court's extension of sovereign immunity to a department of the state). However, if it is not deemed part of the state, then it is subject to this Court's jurisdiction and Plaintiff's claims may proceed.

To determine whether a governmental entity was acting as part of the State, courts typically examine whether it was

exercising power delegated from the State or whether it was performing a proprietary function. *See, Michaeledes v. Golden Gate Bridge, Highway and Transp. Dist.*, 202 F. Supp. 2d 1109, 1111 (N.D. Cal. 2002) ("Lower courts are to determine a public entity's sovereignty 'not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.'") (citing *New York*, 256 U.S. at 500, 41 S. Ct. at 588; *Workman*, 179 U.S. at 570, 573-74, 21 S. Ct. at 212); *see also Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994) (identifying counties as departments or agencies of the state for state law immunity purposes). Plaintiff does not dispute that counties exercise state power to acquire land and build and operate bridges. *See* O.C.G.A. § 32-4-92 (preamble) (enumerating state's delegation of its powers to a county with respect to county road systems); *id.* at (3) (A) (counties may exercise the state's power to condemn land for roads); *id.* at (8) & (11) (county can exercise the state's power to tax for road-building/maintenance purposes); O.C.G.A. §§ 32-4-70 - 324-71 (governing county authority to construct, reconstruct and repair bridges, payment bonds for same).

By acquiring the land, constructing, and operating the bridge in question, the County was exercising these state powers. Merely building and operating roads and bridges does not waive its sovereign immunity. *Kordares v. Gwinnett County*, 220 Ga. App. 848, 849-50, 470 S.E.2d 479 (1996); *see also Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir. 1993) (noting that in the absence of waiver, Georgia's sovereign immunity extends to counties as subdivisions of the state). In fact, it is Plaintiff's burden to show a waiver. *Smith v. Chatham County*, 264 Ga. App. 566, 567-68, 591 S.E.2d 388 (2003). In this case, the County has no immunity-waiving insurance, and Plaintiff has not otherwise shown that the County's sovereign immunity was waived. Accordingly, the Court finds that the County is protected by

sovereign immunity. Defendant's motion for summary judgment is GRANTED.

CONCLUSION

Defendant's motion for summary judgment is **GRANTED** on sovereign immunity grounds. Plaintiff's claims are **DISMISSED WITH PREJUDICE**. The Clerk of Court is **DIRECTED** to **CLOSE** this case. Because summary judgment has been granted in Defendant's favor, Plaintiff's cross motion for summary judgment and motion to strike are **DENIED AS MOOT**.

SO ORDERED this 20th day of June, 2004.

/s William T. Moore, Jr.
WILLIAM T. MOORE, JR., CHIEF
JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

[ATTACHMENT TO DEFENDANT'S MOTION TO DISMISS THE APPEAL]

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-10661
Non-Argument Calendar

D.C. DOCKET NO. 03-00038-CV-4

CONTINENTAL INSURANCE COMPANY,
Subrogated to the rights of
Dennis K. Rings,

Plaintiffs-Appellants,

versus

CHATHAM COUNTY, GA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(JULY 8, 2004)

Before TJOFLAT, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

In a comprehensive order dated January 14, 2004, the district court held that appellee Chatham County, Georgia is entitled to sovereign immunity from appellants' suit for damages sustained when a span of a draw bridge operated by the County struck appellant Riggs' vessel while it passed beneath the bridge. The court therefore granted the County summary judgment.

Appellants now appeal, contending that the district court erred in granting the County sovereign immunity and in denying their motion for summary judgment. Their appeal therefore turns on whether the court properly applied the law relating to sovereign immunity. We find no error in the court's ruling. We adopt its analysis of "common law" sovereign immunity versus Eleventh Amendment sovereign immunity and affirm the court's judgment.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-13308
Non-Argument Calendar

D. C. Docket No. 03-00099-CV-4

ZURICH INSURANCE COMPANY, subrogated to the rights of James K. Ludwig, Jr. & Carol C. Ludwig,

Plaintiff-Appellant,

versus

CHATHAM COUNTY, GA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(JANUARY 28, 2005)

Before BLACK, PRYOR and FAY; Circuit Judges.

PER CURIAM:

This case presents the question of whether or not a Georgia county can be held liable in admiralty for a maritime tort. The district court granted summary judgment to Defendant Chatham County, Georgia, ruling that it was an arm of the State of Georgia, and entitled to sovereign immunity. Moreover, the district court found that Chatham County did not waive its sovereign immunity. Plaintiffs, Zurich Insurance Company, James K. Ludwig, Jr., and Carol Ludwig appealed. We agree that Chatham County is entitled to invoke sovereign immunity, and therefore affirm the district court's grant of summary judgment to the Defendant.

Chatham County owns, operates, and maintains the Causton Bluff Bridge, a drawbridge over the Wilmington River in Georgia, which is part of the Intercoastal Waterway. On October 6, 2002, James K. Ludwig sailed his vessel on

the Intercoastal Waterway, approaching the Causton Bluff Bridge. Mr. Ludwig contacted the bridge operator and requested that the bridge be raised, to allow his vessel to pass underneath. The bridge tender then raised the spans, but the Northwest span of the bridge drifted down; striking Mr. Ludwig's vessel: The damage to the boat amounted to $137,987.67. Mr. Ludwig and his wife, Carol, and their insurer, Zurich Insurance Company, sued Chatham County to recover their expenses. Both Chatham County and the Plaintiffs moved for summary judgment. The district court granted summary judgment to Chatham County, holding that the County enjoyed sovereign immunity because by acquiring land, constructing, and operating the bridge, the County exercised state powers. Additionally, because the County had no immunity-waiving insurance, the Plaintiffs could not demonstrate that the county waived that sovereign immunity.

We review a district court's grant of summary judgment *de novo*, applying the same legal standards used by the district court. *O'Ferrell v. United States*, 253 F.3d 1257, 1265 (11th Cir. 2001). Summary judgment is proper where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We construe the evidence in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-movant. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999).

At issue in this case is the Plaintiffs' ability to sue Chatham County. It is clear that the State of Georgia itself cannot be sued under maritime law based on Eleventh Amendment sovereign immunity. *See Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002). The same immunity,

however, does not extend to counties.[1] Rather, common law has carved out a "residual immunity," which would protect a political subdivision such as Chatham County from suit. *See Gilbert v. Richardson*, 452 S.E.2d 476, 478 (Ga. 1994); *Fed. Maritime Comm'n*; 535 U.S. at 753 ("the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular, exemplification of that immunity").

In *Broward County, Fla. v. Wickman*, the former Fifth Circuit determined, in a substantially similar case where the plaintiff's yacht struck an underwater abutment attached to a county-owned bridge, that "a state and its political subdivisions are immune from process in actions of this character, even in admiralty." 195 F.2d 614, 615 (5th Cir. 1952).[2] *Wickman* explained that because the county owned the bridge and used power delegated by the state to operate the bridge, then the county enjoyed sovereign immunity from a suit in admiralty. *Id.*

The *Wickman* court took care to distinguish itself from *Workman v. City of New York*, 179 U.S. 552 (1900), a case

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[1] Chatham County is not asserting an Eleventh Amendment immunity defense, which would be inapposite to our holding in *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309 (11th Cir. 2003). In *Vierling*, we explained that the Broward County Port Authority was not an arm of the state for Eleventh Amendment purposes because Florida law treated it solely as an entity of the county. Florida had no control over the operation of the port facilities, and Port Authority was an unfunded, independent, and self-sufficient enterprise.

[2] In *Bonner v. City of Prichard* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

primarily relied upon by the Plaintiffs here, where the Supreme Court addressed the substantive law of admiralty, and wrote that local law could not preempt federal admiralty law in order to exempt the City of New York from process. As substantive law was not the issue in *Wickman*, the Fifth Circuit drew a parallel to another Supreme Court decision, *Ex Parte State of New York*, 256 U.S. 490 (1921), which as part of procedural law, found that sovereign immunity principles prevented a court from exercising jurisdiction over the defendant. 256 U.S. at 500. Although our binding precedent is far from recent, the same principle holds true today: "the immunity of a state from a suit in personam in the admiralty brought by a private person without its consent is clear." *J. Ray McDermott & Co., Inc. v. Dept. of High., State of La.*, 267 F.3d 317 (quoting *New York*, 256 U.S. at 500).

We note, however, that when a city, county, or other municipal entity is not exercising power delegated from the state, it cannot be sheltered by sovereign immunity. *Wickman*, 195 F.2d at 615. Therefore, we turn to a decision of this Court in a nearly identical case involving the same bridge, the same county and the same tort. We affirmed, without opinion, the case of *Continental Ins. Co. v. Chatham County. Ga.*, Case No. 04-106610F (11th Cir. 1/14/2004). In *Continental*, the district court granted summary judgment to Chatham County on grounds of sovereign immunity, and explained that the first line of inquiry should be whether the entity could be deemed a part of the State, because only then may it invoke residual sovereign immunity. In addressing that question, the trial court found Chatham County to be an arm of the State of Georgia because it exercised state power by "acquiring the land and constructing/operating the public highway and bridge in question." *See e.g.*, O.C.G.A. § 32-4-92 (enumerating state's delegation of its powers to county with respect to the operations of a county road system); O.C.G.A. §§ 32-4-70, 32-4-71 (governing county authority to contract for the construction and maintenance of bridges).

Moreover, this Court has held that "sovereign immunity extends to counties, as subdivisions of the state." *Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir. 1993).

The district court in the instant case adopted much of *Continental*'s reasoning, and we agree, as we did in affirming *Continental*. This case is no different, and, despite Plaintiffs' insistence, the "mere act" of maintaining and operating bridges and roads does not waive a county's sovereign immunity. In *Continental*, the district court noted Chatham County's lack of immunity-waiving insurance as evidence of non-waiver. Chatham County's insurance policies have not changed since. Additionally, we previously have found that "the State of Georgia is immune to suit for any cause of action unless sovereign immunity is expressly waived by constitutional provision or statute." *Kitchen*, 6 F.3d at 731. Chatham County has not so expressly waived its sovereign immunity. Thus, because Chatham County is not attempting to exempt itself from a suit in admiralty via local law, *see Workman*, nor has it waived sovereign immunity, we AFFIRM the district court's grant of summary judgment for the Defendant Chatham County.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-13308-DD

ZURICH INSURANCE COMPANY, subrogated to the rights of James K. Ludwig, Jr. & Carol C. Ludwig,

Plaintiff-Appellant,

versus

CHATHAM COUNTY, GA,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: BLACK, PRYOR and FAY, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Zurich Insurance is DENIED.

ENTERED FOR THE COURT:

s/ Peter Fay
UNITED STATES CIRCUIT JUDGE

SUPREME COURT OF THE UNITED STATES

ZURICH INSURANCE CO.,
v.
CHATHAM COUNTY, GEORGIA.

No. 04-1618.
Oct. 17, 2005.

Order granting the petition for writ of certiorari amended to read: Petition for writ of certiorari granted limited to the following question: "Whether an entity that does not qualify as an 'arm of the state' for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit."

Supreme Court, U.S.
FILED
DEC 16 2005
OFFICE OF THE CLERK

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No. 04-1618

IN THE

Supreme Court of the United States

NORTHERN INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

CHATHAM COUNTY, GEORGIA,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether an entity that does not qualify as an "arm of the State" for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit.

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to the proceeding in the court below.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that Northern Insurance Company of New York is a wholly owned subsidiary of Maryland Casualty Company, a Maryland corporation; Maryland Casualty Company is a wholly owned subsidiary of Zurich American Insurance Company, a New York corporation; Zurich American Insurance Company is a wholly owned subsidiary of Zurich Holding Company of America, Inc., a Delaware corporation; Zurich Holding Company of America, Inc., is a 99.8711% owned subsidiary of Zurich Insurance, a Swiss corporation (the remaining 0.1289% is owned by ZGA US Limited); Zurich Insurance is a wholly owned subsidiary of Zurich Group Holding, a Swiss corporation; Zurich Group Holding is owned 43% by Allied Zurich p.l.c. and 57% by Zurich Financial Services; and Allied Zurich p.l.c. is a wholly owned subsidiary of Zurich Financial Services; Zurich Financial Services is the only publicly traded parent company.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is unreported. J.A. 81a-85a. The order of the court of appeals denying the petition for panel rehearing is unreported. *Id.* 86a. The order of the district court is unreported. *Id.* 70a-78a.

JURISDICTION

The district court had jurisdiction over petitioner's claims pursuant to 28 U.S.C. § 1333(1). The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on January 28, 2005. J.A. 1a. A timely petition for panel rehearing was denied on March 4, 2005. *Id.* 2a. The petition for a writ of certiorari was filed on June 1, 2005, and granted on October 11, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Article I, § 2, ¶ 9(e) of the Georgia Constitution provides:

Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sov-

ereign immunity is thereby waived and the extent of such waiver.

Article IX, § 1, ¶ 1 of the Georgia Constitution provides, in relevant part:

Each county shall be a body corporate and politic with such governing authority and with such powers and limitations as are provided in this Constitution and as provided by law. . . .

Ga. Code Ann. § 36-1-3 provides:

§ 36-1-3. Every county as body corporate

Every county is a body corporate, with power to sue or be sued in any court.

Ga. Code Ann. § 36-1-4 provides:

§ 36-1-4. When county liable to suit

A county is not liable to suit for any cause of action unless made so by statute.

STATEMENT

1. Chatham County, Georgia, owns, maintains, and operates the Causton Bluff Bridge, a drawbridge that spans the Wilmington River and connects the City of Savannah to neighboring Whitemarsh Island by way of a road known as the Islands Expressway. J.A. 70a. The Wilmington River is part of the Atlantic Intracoastal Waterway, a 1,192-mile course of rivers, bays, and man-made canals that facilitates commercial and recreational navigation along the East Coast of the United States from Norfolk, Virginia, to Miami, Florida. 33 U.S.C. § 1804(6). Congress authorized the creation of the Atlantic Intracoastal Waterway, and provided for it to be maintained by the United States Army Corps of Engineers and administered jointly by the Corps and the United States Coast Guard. *Id.* § 1; 33 C.F.R. §§ 2.36(a)(2), 162.65, 207.160.

The operation of drawbridges over navigable waters, including the Atlantic Intracoastal Waterway, is governed by federal law. *See* 33 U.S.C. § 499; 33 C.F.R. § 117.1 *et seq.*[1] Federal regulations provide that "drawbridges shall open promptly and fully for the passage of vessels when a request to open is given," and that "owners of drawbridges shall ensure that . . . [t]he operating machinery of the draw is maintained in a serviceable condition." *Id.* §§ 117.5, 117.7(b)(2). Federal law also regulates the Causton Bluff Bridge specifically, providing that the bridge "shall open on signal," except during morning and evening rush hours, when "the draw need only open at 7 a.m., 8 a.m. and 5:30 p.m." *Id.* § 117.353(b).

2. On October 6, 2002, James Ludwig was navigating the Wilmington River aboard his sailboat, the *Love of My Life*. J.A. 82a. As he approached the Causton Bluff Bridge, Mr. Ludwig radioed the bridge tender, an employee of Chatham County, and requested that the draw be raised. *Id.* The bridge tender raised the spans, but—just as the *Love of My Life* approached the bridge—one of the spans malfunctioned, slipped out of the raised position, and fell toward the plane of the roadway. *Id.* Before the bridge tender could re-raise the span, the *Love of My Life*'s mast collided with the span, causing the hull to strike the bridge. *Id.* 71a. The *Love of My Life* was severely damaged in the collision and required extensive repairs. Mr. Ludwig and his wife, Carol Ludwig, incurred losses in excess of $130,000 as a result of the collision.

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[1] Indeed, federal regulations specifically preempt all state laws that purport to regulate such drawbridges. *See* 33 C.F.R. § 117.1, note ("Laws, ordinances, regulations, and rules which purport to regulate these bridges and which are not promulgated by the Federal Government have no force and effect.").

The Ludwigs filed a claim with the vessel's insurer, Northern Insurance Company of New York ("Northern"). Northern paid the Ludwigs' claim according to the policy's terms, and then filed a claim with Chatham County as subrogee to the Ludwigs' rights. Chatham County denied the claim, asserting, *inter alia*, that it enjoyed sovereign immunity from suit.

3. Northern filed suit against the County in the United States District Court for the Southern District of Georgia, invoking the court's admiralty jurisdiction. J.A. 9a; 28 U.S.C. § 1333(1). The County answered that Northern's claims were barred by sovereign immunity, and moved for summary judgment on that basis. In its summary judgment motion, the County conceded that "Eleventh Amendment immunity does not extend to counties" because counties are not arms of the State for Eleventh Amendment purposes. J.A. 33a (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). The County nevertheless contended that there exists a "[c]ommon law doctrine of sovereign immunity" distinct from "Eleventh Amendment immunity." *Id.* 34a. The County acknowledged that even this so-called common-law immunity "does not extend to lesser entities which are not arms of the state." *Id.* (citing *Alden v. Maine*, 527 U.S. 706, 756-57 (1999)). The County argued, however, that under the old Fifth Circuit's decision in *Broward County v. Wickman*, 195 F.2d 614 (5th Cir. 1952), any "political subdivision of the state" that "exercise[s] delegated state powers" is an arm of the State entitled to common-law sovereign immunity, J.A. 32a, 34a, and that the County could assert such immunity as a defense because its authority to operate the Causton Bluff Bridge was delegated to it by the State of Georgia. *Id.* 33a. The County further argued that, even if common-law sovereign immunity were unavailable, it could rely upon a Georgia constitutional provision granting immunity to "all of [the State's] departments

and agencies." *Id.* 35a-37a (citing Ga. Const. art. I, § 2, ¶ 9(e)).

The district court granted summary judgment to the County on the basis of the County's purported common-law sovereign immunity. *See* J.A. 78a. Framing the "pertinent issue" as "whether the County is entitled to the same immunity as the state," *id.* 75a, the district court largely adopted the County's arguments. Although the district court acknowledged that a county could not assert sovereign immunity under the Eleventh Amendment, it nevertheless concluded that, under the Fifth Circuit's *Wickman* decision, a county could assert "a 'residual sovereign immunity' that arises from common law." *Id.* 74a. The district court interpreted *Wickman* as extending "sovereign immunity from admiralty process" to counties and municipalities when those entities "may be deemed part of the state, either by having exercised power delegated from the state, or because [they are] a political subdivision of the state." *Id.* 76a. The district court reasoned that, because Chatham County was exercising power delegated to it by the State of Georgia when building, operating, and maintaining the Causton Bluff Bridge, the County was a part of the State of Georgia for residual sovereign immunity purposes and therefore entitled to immunity from suit. *Id.* 77a.

4. The Eleventh Circuit affirmed in an unpublished opinion. J.A. 81a. Like the district court, the court of appeals acknowledged that Eleventh Amendment immunity "does not extend to counties," because counties and their governmental bodies are not "'arm[s] of the state' for Eleventh Amendment purposes." *Id.* 83a & n.1 (citing *Vierling v. Celebrity Cruises*, 339 F.3d 1309 (11th Cir. 2003)). The court concluded, however, that the "common law has carved out a 'residual immunity,' which would protect a political subdivision such as Chatham County from suit." *Id.* 83a. The court believed that the existence of such a "residual immunity" was supported by this Court's decision in *Federal*

Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002) ("*FMC*"), where this Court stated that the "Eleventh Amendment does not define the scope of the States' sovereign immunity" but is merely "one particular exemplification of that immunity." J.A. 83a. And the court of appeals defined the contours of such "residual immunity" by reference to its "far from recent" *Wickman* precedent, which had held that "a city, county or municipal entity" must be deemed a "part of the state"—and thus entitled to sovereign immunity—if it is "exercising power delegated from the State." *Id.* 84a.

To determine whether Chatham County was exercising delegated state authority when operating the drawbridge, the Eleventh Circuit looked to a recent unpublished decision involving the same bridge and nearly identical facts. J.A. 84a (citing *Cont'l Ins. Co. v. Chatham County*, No. 04-10661-FF, 112 Fed. Appx. 3 (11th Cir. July 8, 2004) (reproduced at J.A. 79a)). The district court had found in *Continental Insurance* that Chatham County was an "arm of the State of Georgia" for residual sovereign immunity purposes "because it exercised State power by 'acquiring the land and constructing/operating the public highway and bridge in question.'" *Id.* 84a (quoting *Cont'l Ins. Co. v. Chatham County*, No. 4:03CV038, Order at 6 (S.D. Ga. Jan. 14, 2004) (reproduced at J.A. 71a)). "This case," the Eleventh Circuit concluded, "is no different." *Id.* 85a. Finally, the Eleventh Circuit also relied on its decision in *Kitchen v. CSX Transportation, Inc.*, 6 F.3d 727 (11th Cir. 1993), a diversity case in which the Eleventh Circuit had invoked the Georgia Constitution to conclude that Georgia's "sovereign immunity extends to counties, as subdivisions of the state." *Id.* at 731.

This Court granted certiorari, limited to the question "[w]hether an entity that does not qualify as an 'arm of the state' for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit." J.A. 87a.

SUMMARY OF ARGUMENT

This Court has consistently expressed in unequivocal terms that only States and arms of the State can assert sovereign immunity as a defense in federal court. *Alden*, 527 U.S. at 740. Plaintiffs therefore "may bring suit for damages against *all* others, including municipalities and other political subdivisions of a State." *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 n.10 (2001) (emphasis added). In holding that Chatham County was entitled to invoke "residual immunity," the court of appeals disregarded this well-established limitation on the scope of sovereign immunity.

The gravamen of the court of appeals' decision is that there are *two* tests available to determine whether an entity is an "arm of the State"—one for claims of "Eleventh Amendment immunity," and another, far less stringent standard for claims of "residual immunity." The essential predicate to this holding—that there exists a "residual sovereign immunity" separate and distinguishable from the sovereign immunity that this Court has addressed in its Eleventh Amendment jurisprudence—is, however, fundamentally mistaken. This Court has repeatedly held that there is only one species of sovereign immunity, which is embodied in the constitutional structure, and that the Eleventh Amendment is merely an exemplification of that immunity. Indeed, the Court recently reiterated that conclusion in *FMC*, 535 U.S. at 753, the very case relied upon by the court of appeals to support the purported coexistence of both "Eleventh Amendment" and "residual" sovereign immunity. Acknowledgment of the fact that sovereign immunity is a unitary doctrine emanating from the constitutional structure is sufficient to dispose of the court of appeals' suggestion that there are dueling tests for assessing whether a political subdivision enjoys sovereign immunity.

Moreover, by holding that sovereign immunity extends to any "city, county, or other municipal entity" that "exercis[es] power delegated from the state," the court of appeals flatly contradicted numerous decisions of this Court holding that such entities do *not* enjoy sovereign immunity. This well-established rule can be traced back at least to 1890, *see Lincoln County v. Luning*, 133 U.S. 529 (1890), and has been applied in the admiralty context since the turn of the twentieth century, *see Workman v. City of New York*, 179 U.S. 552 (1900). And this Court has long since rejected the argument—embraced by the court of appeals—that the exercise of "a slice of State power" suffices to convert a municipality into an arm of the State. *Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979). Indeed, the proposition that "municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit," *Jinks v. Richland County*, 538 U.S. 456, 466 (2003), can no longer seriously be questioned.

The court of appeals disregarded this vast body of legal authority—almost none of which it even acknowledged, much less analyzed—and instead relied principally upon the old Fifth Circuit's decision in *Wickman*. Insofar as *Wickman* dismissed as an "assum[ption]," 195 F.2d at 615, this Court's statement in *Workman*, 179 U.S. 552, that "municipal corporations . . . may be sued," *id.* at 565, and ascribed to *Ex parte State of New York, No. 1*, 256 U.S. 490 (1921), the novel proposition that a State's sovereign immunity extends to all "political subdivisions" of the State, *Wickman*, 195 F.2d at 615, *Wickman* was wrong when decided. Even if it were not, however, *Wickman*'s holding cannot possibly survive this Court's more recent and unambiguous statements that counties and municipalities cannot invoke sovereign immunity. *See Jinks*, 538 U.S. at 466 ("municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit"); *Alden*, 527 U.S. at 756 ("sovereign immunity . . . bars suits against States but not lesser entities"). Those decisions abso-

lutely foreclose the court of appeals' holding that Chatham County is entitled to sovereign immunity in this admiralty suit.

Finally, to the extent that the court of appeals relied upon Georgia law to conclude that Chatham County is entitled to sovereign immunity, it directly contradicted this Court's decision in *Workman*, which held that the general maritime law preempts all state-law immunities and that state law cannot circumscribe the reach of federal courts' admiralty jurisdiction. 179 U.S. at 563. Indeed, even the Supreme Court of Georgia has acknowledged that state-law immunity cannot shield Chatham County from federal admiralty jurisdiction. *See Hines v. Ga. Ports Auth.*, 604 S.E.2d 189, 191 (Ga. 2004).

The judgment of the court of appeals should be reversed.

ARGUMENT

I. THERE IS A SINGLE DOCTRINE OF SOVEREIGN IMMUNITY THAT ARISES FROM THE STRUCTURE OF THE CONSTITUTION

1. The court of appeals' holding that Chatham County is entitled to "residual" sovereign immunity is premised upon an erroneous reading of this Court's decision in *FMC* and a fundamental misunderstanding of the source and scope of the States' sovereign immunity. The court of appeals' analysis proceeded on the erroneous assumption that there are two distinct categories of sovereign immunity—"Eleventh Amendment immunity" and "common law" (or "residual") sovereign immunity—and that it is possible for a county to be entitled to one type of sovereign immunity but not the other. *See* J.A. 83a (although Eleventh Amendment immunity "does not extend to counties[,] . . . common law has carved out a 'residual immunity,' which would protect a political subdivision such as Chatham County from suit") (footnote omitted). Although early decisions of this Court

regarded the Eleventh Amendment as the source of the States' immunity in federal court, and other decisions suggested that sovereign immunity extends beyond the specific text of that Amendment, *see, e.g.*, *Hans v. Louisiana*, 134 U.S. 1, 21 (1890), this Court's modern cases make quite clear that the dichotomy supposed by the court of appeals does not accurately describe federal immunity law.

As has been recognized by this Court's most recent cases, the frequently used phrase "Eleventh Amendment immunity" is "something of a misnomer" because sovereign immunity "derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Alden*, 527 U.S. at 713, 728. Indeed, "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution." *Id.* at 713; *see also The Federalist No. 81*, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent .... [T]he exemption ... is now enjoyed by the government of every State in the Union.").

The States "entered the federal system with their sovereignty intact." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991). The Constitution preserved that sovereignty by creating a federal government of limited and enumerated powers, by reserving to the States all powers not delegated to the federal government, and by prohibiting the federal government from directly regulating the States. *Alden*, 527 U.S. at 728 (citing U.S. Const. amend. X). These measures established a system of "[d]ual sovereignty" in which the States and the United States each possess sovereign attributes and perform distinct constitutionally prescribed functions. *FMC*, 535 U.S. at 751. Because the "Constitution specifically recognizes the States as sovereign entities," *Seminole Tribe v. Florida*, 517 U.S. 44, 71 (1996), "[t]hey are not relegated to the role of mere provinces or political corporations." *Alden*, 527 U.S. at 715. They instead

"retain the dignity . . . of sovereignty," one of the prerogatives of which is immunity from suit without consent. *Id.*

The Eleventh Amendment merely "evidenc[es] and exemplif[ies]" this "broader concept of immunity[] implicit in the Constitution." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267-68 (1997). The Amendment itself is not the source of that immunity. *Id.* at 268. The impetus for the Eleventh Amendment's enactment was this Court's erroneous holding in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that federal courts possessed jurisdiction over suits against nonconsenting States brought by citizens of another State. *See Alden*, 527 U.S. at 721-22 (acknowledging that *Chisholm* was wrongly decided). The "decision fell upon the country with a profound shock," *id.* at 720 (internal quotation marks omitted), and led to the Eleventh Amendment's prompt introduction and ratification. *Id.* The Amendment restored the pre-*Chisholm* status quo by clarifying that the federal judicial power does not extend to suits against nonconsenting States brought by citizens of another State. *See FMC*, 535 U.S. at 752.

In drafting the Amendment, Congress did not "explicitly memorializ[e] the full breadth of the sovereign immunity retained by the States when the Constitution was ratified," but chose "only to address the specific provisions of the Constitution that . . . formed the basis of the *Chisholm* decision." *FMC*, 535 U.S. at 753 (internal quotation marks omitted); *see also Alden*, 527 U.S. at 722 ("Congress acted not to change but to *restore* the original constitutional design") (emphasis added). The Eleventh Amendment thus "does not define the scope of the States' sovereign immunity" but instead is "one particular exemplification of that immunity." *Id.*

2. The court of appeals' distinction between "Eleventh Amendment" and "common-law" immunity is inconsistent with the single, unified body of sovereign immunity law that "exists today by constitutional design." *Alden*, 527 U.S. at

733. Indeed, the decision on which the court of appeals relied to bolster its Eleventh Amendment-residual immunity dichotomy—*FMC*—actually supports the contrary position. *FMC* unambiguously stated that the font of the States' immunity is not the Eleventh Amendment, but instead the structure of the Constitution, which embodies the law of sovereign immunity that predated the Constitution's ratification. 535 U.S. at 753-54.

Because sovereign immunity is a unitary and "fundamental postulate[] implicit in the [C]onstitution[]," *Alden*, 527 U.S. at 729, the principles that this Court has declared when employing the "convenient shorthand" of "Eleventh Amendment immunity" are applicable to *all* sovereign immunity claims. *Id.* at 713. In this case, then, the appropriate question is not whether Chatham County is entitled to either "Eleventh Amendment immunity" or "common-law sovereign immunity," but whether there is any basis for extending to counties the sovereign immunity embedded in the constitutional structure.

3. The fact that this case was brought in admiralty certainly offers no basis for the invention and application of a broader conception of sovereign immunity than that applied by this Court under other, more commonly invoked heads of federal jurisdiction. "[G]eneral maritime law [is] a species of judge-made federal common law," *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996) (parentheses omitted), and the sovereign immunity principles that govern in the federal question context therefore have equal force in the admiralty setting. *See Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 489 (1987); *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982) (plurality op. of Stevens, J.). Indeed, this Court has explicitly rejected the proposition that anything other than traditional federal-law principles of sovereign immunity should be applied in admiralty cases. *See FMC*, 535 U.S. at 767 (declining to create a "maritime commerce" exception to

state sovereign immunity); *see also id.* at 751 n.6 (endorsing the Fourth Circuit's application of traditional arm-of-the-state analysis). Perhaps for that reason the court of appeals did not suggest—and Chatham County did not argue below—that sovereign immunity has a more expansive reach in admiralty cases than in others.

II. THIS COURT HAS CONSISTENTLY REJECTED COUNTIES' SOVEREIGN IMMUNITY CLAIMS

Although "immunity of a truly independent sovereign from suits in its own courts has been enjoyed as a matter of absolute right for centuries," *Nevada v. Hall*, 440 U.S. 410, 414 (1979), there is no comparable historical tradition affording immunity to counties and other political subdivisions. *See Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 579 (1946) ("consent [is] not necessary for suits against counties"). To the contrary, there is a "longstanding principle . . . that political subdivisions are not as such sovereign," and therefore cannot claim sovereign immunity. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413 (1978); *see also Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 312 (1990) ("this Court has long held that counties and cities are not so integrally related to the State that they are shielded from suit in federal court"). Indeed, this Court has reached this conclusion both in decisions applying the modern conception that sovereign immunity is derived from the Constitution's structure, *see, e.g.*, *Alden*, 527 U.S. at 756, and in earlier decisions applying the now-outmoded notion that the Eleventh Amendment is the source of that immunity, *see, e.g.*, *Lincoln County*, 133 U.S. at 530. The court of appeals' conclusion that Chatham County is entitled to sovereign immunity merely because it purportedly "exercise[s] power delegated from the state" (J.A. 84a) conflicts with this unbroken line of decisions.

A. More Than A Century Of Precedent Holds That Counties Are Not Entitled To Sovereign Immunity

1. In *Jinks v. Richland County*, 538 U.S. 456, this Court—just three Terms ago—unanimously rejected a South Carolina county's argument that sovereign immunity barred 28 U.S.C. § 1367(d) from tolling the statute of limitations on a state-law claim initially filed against the county in federal court but later refiled in state court after the federal court declined to exercise supplemental jurisdiction. *Id.* at 466. The Court held that Congress has the authority to subject a non-consenting county to suit in state court because counties and other "municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit." *Id.* Thus, although "Congress lacks authority under Article I to override a *State's* immunity from suit in its own courts, it may subject a *municipality* to suit in state court." *Id.* at 465-66 (emphases added; citation omitted); *see also id.* at 466 (Congress possesses "the undisputed power . . . to override state-law immunity when subjecting a municipality to suit under a federal cause of action").[2]

The inherent limits on sovereign immunity recognized in *Jinks* have been clear since at least *Lincoln County*, 133 U.S. 529, where this Court held that a Nevada county that was sued for failure to pay interest on municipal bonds could not invoke the State's sovereign immunity because the "Eleventh

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[2] Even if there were a distinction between "Eleventh Amendment immunity" and "common-law sovereign immunity"—and *Alden* and *FMC* demonstrate that there is not—*Jinks* would still pose an insurmountable obstacle to Chatham County's claim of sovereign immunity. The Eleventh Amendment was not even arguably the source of immunity in *Jinks* because the county was claiming sovereign immunity in *state* court and the Amendment's text applies only to the "Judicial power of the United States." U.S. Const. amend. XI.

Amendment limits the jurisdiction [of federal courts] only as to suits against a State." *Id.* at 530. The Court explained that, "while the county is territorially a part of the State, . . . it is also a corporation created by and with such powers as are given to it by the State." *Id.* As a corporate body, the county had the power to sue and be sued—including in federal court—and it thus was "part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State." *Id.*

Similarly, in *Griffin v. County School Board*, 377 U.S. 218 (1964), this Court held that a federal district court possessed the authority to enjoin county officials from paying tuition grants that funded racially discriminatory private schools and to order the officials to reopen the public school system, which had been closed to avoid court-ordered desegregation. *Id.* at 233. This Court declared that it "has long been established that actions against a county can be maintained in United States courts in order to vindicate federally guaranteed rights." *Id.* (citing *Lincoln County*, 133 U.S. 529).

The holdings in *Lincoln County* and *Griffin* have been unhesitatingly reaffirmed in subsequent cases. *See, e.g.*, *Feeney*, 495 U.S. at 312 ("counties and cities are not so integrally related to the State that they are shielded from suit in federal court"); *Bogan v. Scott-Harris*, 523 U.S. 44, 53 (1998) ("Municipalities themselves can be held liable for constitutional violations, whereas States and the Federal Government are often protected by sovereign immunity."); *see also Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 (2001) ("the Eleventh Amendment does not extend its immunity to units of local government"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) ("cities and counties do not enjoy Eleventh Amendment immunity"); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124 n.34 (1984) ("We have held that the Eleventh Amendment does not apply to counties") (internal quotation marks

omitted); *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 280 (the "bar of the Eleventh Amendment to suit in federal courts . . . does not extend to counties"). The court of appeals did not even attempt to reconcile its holding with these controlling precedents.

2. This Court has similarly accorded dispositive weight to the distinction between sovereign States and nonsovereign municipal corporations in cases considering whether governmental bodies are subject to certain federal causes of action. In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court held that counties and other municipal corporations are encompassed by the statutory term "person" and are therefore subject to suit under 42 U.S.C. § 1983. *Id.* at 690. The Court explained that there is "no constitutional impediment to municipal liability" and explicitly rejected the proposition that sovereign immunity posed an obstacle to suit. *Id.* at 690 n.54. In contrast, the Court held several years later in *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989), that States are *not* within Section 1983's ambit. In reaching this conclusion, the Court emphasized that "States are protected by the Eleventh Amendment while municipalities are not." *Id.* at 70. *Compare also Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894) (holding that a State is not a "citizen" for purposes of diversity jurisdiction), *with Moor v. County of Alameda*, 411 U.S. 693, 718 (1973) (it is "firmly rooted in federal law that . . . political subdivisions are citizens of their respective States" and thus subject to suit in diversity) (internal quotation marks omitted).

The same distinction is applicable under the False Claims Act. In *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003), this Court held that counties constitute "persons" within the meaning of the Act and are amenable to suit thereunder. *Id.* at 134. The Court reached that conclusion even though it had earlier held in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,

529 U.S. 765 (2000), that States cannot be sued under the False Claims Act. In distinguishing *Vermont Agency*, the *Cook County* Court relied upon the "understanding going back at least to Coke that municipal corporations and private ones [are] simply two species of 'body politic and corporate,' treated alike in terms of their legal status as persons capable of suing and being sued." *Cook County*, 538 U.S. at 126 (citation omitted). The Court concluded that "municipal corporations, like private ones, should be treated as natural persons for *virtually all* purposes of constitutional and statutory analysis." *Id.* at 127 (emphasis added; internal quotation marks omitted).

Like Cook County, Chatham County—a municipal corporation chartered under the laws of the State of Georgia—is a "citizen" for purposes of the diversity statute, and a "person" for purposes of Section 1983 and the False Claims Act. By definition, citizens and persons are not sovereigns. As a municipal corporation, Chatham County's very existence "rests in the absolute discretion of the State." *City of Trenton v. New Jersey*, 262 U.S. 182, 186 (1923); *see also Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907). Sovereign immunity's "preeminent purpose" of "accord[ing] States the dignity that is consistent with their status as sovereign entities," *FMC*, 535 U.S. at 760, thus does not extend to Chatham County. Unlike Georgia, which "Congress [must] treat . . . in a manner consistent with [its] status as [a] residuary sovereign[]," *Alden*, 527 U.S. at 748, Chatham County—a nonsovereign entity—suffers no affront to its dignity when called to answer for its conduct in federal court.

B. The Mere Exercise Of Delegated State Power Does Not Entitle Political Subdivisions To Sovereign Immunity

1. The Eleventh Circuit not only fundamentally erred in supposing the existence of two distinct doctrines of sovereign immunity law, but it also erred in adopting a watered-down

test for ascertaining which entities are sufficiently aligned with the State to share in the State's immunity. According to the Eleventh Circuit, any political subdivision may share in the State's sovereign immunity merely by showing that it exercises some delegated state power. *See* J.A. 84a. This Court's cases, however, squarely hold that only entities that qualify as "arms of the State" are entitled to sovereign immunity. *See, e.g., Alden*, 527 U.S. at 756. By repeatedly holding—for more than a century—that counties are not immune, this Court necessarily has settled that counties are not "arms of the State." And just as federal law recognizes only a single, unitary doctrine of sovereign immunity that may be claimed by States, so, too, it recognizes only a single inquiry to determine which other entities may share in that immunity—the "arm of the state" test. The Eleventh Circuit's attempt to craft a significantly more expansive, "delegated state power" doctrine of immunity must fail.

Both in cases that fall within the Eleventh Amendment's textual scope, and in cases beyond the Amendment's textual purview, this Court has consistently determined an entity's entitlement to immunity by reference to the same arm-of-the-state factors, including whether the entity's debts are paid by the State, the extent of state control over the entity, and its characterization under state law. *See Lake Country Estates, Inc.*, 440 U.S. at 400-02. In *Regents of the University of California v. Doe*, 519 U.S. 425 (1996), for example—a case within the Eleventh Amendment's textual scope because it involved a diversity action against a government body—this Court concluded that a university was an arm of the State because California was legally liable for any judgments against it. *Id.* at 431.

Contrary to the court of appeals' conclusion, these same considerations govern the arm-of-the-state inquiry in cases outside of the Eleventh Amendment's textual scope. In *FMC*, 535 U.S. 743—an admiralty dispute adjudicated by a federal agency—this Court endorsed the Fourth Circuit's

conclusion that, under the traditional arm-of-the-state framework, the South Carolina State Ports Authority was not an arm of the State. *Id.* at 751 n.6 (citing *Ristow v. S.C. Ports Auth.*, 58 F.3d 1051 (1995)). Moreover, in *Hess*, 513 U.S. 30—a case outside the Eleventh Amendment's literal text because it involved a federal statutory claim brought against a government body—this Court held that the Port Authority Trans-Hudson Corporation ("PATH"), which was formed pursuant to an interstate compact between New York and New Jersey, was not an arm of the State because neither State was responsible for judgments against it. *Id.* at 52. Similarly, in *Mt. Healthy City School District Board of Education*, 429 U.S. 274, another case involving a federal claim against a government entity, the Court held that an Ohio school district was not an arm of the State because it was excluded from the statutory definition of "State" under Ohio law and enjoyed significant autonomy, as evidenced by its extensive powers to issue bonds and levy taxes. *Id.* at 280.

The Court has even applied the *Hess* and *Mt. Healthy* factors in cases outside of the context of sovereign immunity, further demonstrating that there is a single definition of "arm of the State" applicable in *all* settings. In *Moor*, for example, a case in which a California county claimed that it was not a "citizen" for diversity-of-citizenship purposes, the Court held that only an arm of the State could escape the status of "citizen." 411 U.S. at 718. The Court concluded that Alameda County did not qualify as an arm of the State because it was liable for its own judgments, could exercise the powers of taxation and property ownership, and was designated by state law as a "body corporate and politic," which indicated that the county—like all other corporate entities—was capable of suing and being sued. *Id.* at 719.

There is therefore no support for the court of appeals' conclusion that, in cases not implicating the Eleventh Amendment, a more permissive definition of "arm of the

State"—extending to all entities that exercise delegated state power—applies. To the contrary, this Court has long held that the mere exercise of powers delegated by a State is insufficient to imbue a political subdivision with arm-of-the-state status. In *Lake Country Estates*, for example, the Court explicitly rejected the lower court's conclusion that a bistate agency's exercise of delegated state power rendered it an arm of the State. 440 U.S. at 401. Noting its "consistent[] refus[al] to construe" sovereign immunity as "afford[ing] protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power,'" the Court held that the bistate agency was not an arm of the State and was therefore amenable to suit. *Id.*

That conclusion makes eminent sense. The reality is that *all* of the powers exercised by a county are delegated by the State because counties are "merely a department of the State . . . exercising and holding powers and privileges subject to the sovereign will.'" *City of Trenton*, 262 U.S. at 187. Thus, just as Chatham County is operating the Causton Bluff Bridge pursuant to delegated state power, Lincoln County was exercising authority delegated to it by a Nevada statute authorizing the issuance of county bonds, *Lincoln County*, 133 U.S. at 532, and the county in *Griffin* closed its public schools pursuant to a Virginia statute that repealed the State's compulsory attendance laws and delegated school attendance decisions to municipalities. 377 U.S. at 222. The court of appeals' conclusion that any county wielding delegated state powers is entitled to immunity therefore cannot be reconciled with this Court's precedent.

Moreover, affording sovereign immunity to Chatham County on the ground that it exercises power delegated to it by the State of Georgia would profoundly alter the legal landscape by insulating every manner of political subdivision—from counties, to towns, to school boards—from federal causes of action. This Court long ago recognized that federal law would not permit the "denial of justice" that

would result from endowing municipal defendants "with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor." *Workman*, 179 U.S. at 559. Indeed, it would be "'uniquely amiss' . . . if the government itself . . . were permitted to disavow liability for the injury it has begotten." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). There is no plausible basis for radically rewriting this settled area of the law.

Here, it is no longer open to Chatham County to contend that it is an "arm of the State." The question prescribed by this Court presumes that the County cannot make that showing, and for good reason: Nothing about the powers Chatham County may exercise under Georgia law is sufficiently unusual to take Chatham County out of the rule that this Court has followed for more than a century—that sovereign immunity "does not extend to counties." *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 280; *see also Feeney*, 495 U.S. at 313 ("[W]hen a State creates subdivisions and imbues them with a significant measure of autonomy, such as the ability to levy taxes, issue bonds, or own land in their own name, these subdivisions are too separate from the State to be considered its 'arms.'").[3]

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[3] The County plainly fails any evenhanded application of this Court's arm-of-the-state inquiry. Chatham County alone is liable for judgments entered against it. *See* J.A. 51a, 55a. Georgia exercises no direct control over the County's day-to-day operations, ceding control instead to a directly elected board of commissioners. *See* Ga. Code Ann. § 36-5-22; *see also* Ga. Const. art. IX, § 1, ¶ 3 (providing that each county shall elect its clerk of the superior court, judge of the probate court, sheriff, and tax commissioner). The board exercises broad authority over the County's finances, property, and transportation infrastructure. *See* Ga. Const. art. IX, § 2, ¶ 1 (granting the "governing authority of each county" legislative power to adopt "reasonable ordinances, resolutions, or regula-

C. The Decision Below Offers No Sound Basis For Rejecting This Court's Well-Established Rule That Counties Are Not Entitled To Sovereign Immunity

The principal authority that the court of appeals marshaled in support of its holding was the old Fifth Circuit's 1952 decision in *Broward County v. Wickman*, 195 F.2d 614, which held that a county, as "a political subdivision of the state itself, enjoys [sovereign] immunity" in admiralty actions. *Id.* at 615. *Wickman*, however, is utterly at odds with this Court's decisions in *Alden* and *Jinks*, which squarely hold that counties are not entitled to sovereign immunity. *Alden*, 527 U.S. at 756 ("[S]overeign immunity . . . bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."); *Jinks*, 538 U.S. at 466 ("municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit").

Indeed, not only has *Wickman* been superseded by this Court's recent sovereign immunity cases, but it also was demonstrably incorrect at the time it was decided. *Wickman*'s

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[Footnote continued from previous page]

tions relating to its property, affairs, and local government"); Ga. Const. art. IX, § 6 (granting "[a]ny county" the power to issue revenue bonds); Ga. Code Ann. § 36-5-22.1 (granting the "governing authority of each county" "exclusive" authority over county property, roads, and taxation). Finally, Georgia law classifies Chatham County as a "body corporate, with power to sue or be sued in any court," *id.* § 36-1-3, and its very existence is dependent upon Georgia's acquiescence, *see* Ga. Const. art. IX, § 1, ¶ 2(c) ("The General Assembly may provide by law for the consolidation of two or more counties into one"). Even the Supreme Court of Georgia has recognized that a "body corporate and politic," liable for its own debts, cannot qualify as an arm of the State. *Hines*, 604 S.E.2d at 194 (internal quotation marks omitted).

holding was premised upon a mischaracterization of this Court's decision in *Ex parte State of New York, No. 1*, 256 U.S. at 498-500, which held that States can invoke sovereign immunity against *in personam* admiralty suits. *Wickman* cites *Ex parte State of New York* for the proposition that "states [and] their *political subdivisions* . . . enjoy the prerogatives of sovereignty to the extent of being immune from suits by individuals." *Wickman*, 195 F.2d at 615 (emphasis added). *Ex parte State of New York*, however, involved only a *State's*—not a *municipality's*—sovereign immunity claim. The question of a political subdivision's entitlement to sovereign immunity was not before the Court, and the decision said absolutely nothing on the subject. *See* 256 U.S. at 500 ("the immunity of a *State* from suit *in personam* in the admiralty brought by a private person without its consent[] is clear") (first italics added).

Had the Court extended sovereign immunity to political subdivisions in *Ex parte State of New York*, it would have been a remarkable event, for even in 1921, the rule that sovereign immunity did not extend to municipalities and counties was well-established. A decade earlier, the Court held in *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636 (1911), that "neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty." *Id.* at 645; *see also id.* at 642-43 (sovereign immunity is "a high attribute of sovereignty—a prerogative of the State itself"). The *Hopkins* Court explained that "counties, cities, townships and similar bodies politic . . . cannot rely on freedom from accountability as could a State" because a municipal corporation is merely a "juristic person, whose right to hold and use property [is] coupled with the provision that it might sue and be sued." *Id.* at 645-46; *see also Port of Seattle v. Or. & W. R.R.*, 255 U.S. 56, 71 (1921) ("The Port being a municipal corporation under the laws of Washington . . . could have been sued in the federal court.").

And at the turn of the twentieth century, in still another admiralty case, the Court had held in *Workman* that the City of New York could not invoke state-law immunity as a defense to an admiralty action. 179 U.S. at 565. To reach that conclusion, it was first necessary for the Court to determine whether the City was entitled to sovereign immunity under the United States Constitution. The Court concluded that it was not, holding that, "[a]s a result of the general principle by which a municipal corporation has the capacity to sue and be sued, it follows that there is *not* limitation taking such corporations out of the reach of the process of a court of admiralty." *Id.* (emphasis added). Having determined that the City was subject to a federal admiralty court's jurisdiction, the Court went on to hold that state-conferred immunity could not defeat that jurisdiction by offering a complete defense on the merits. *Id.*

The *Wickman* decision unconvincingly distinguished *Workman*'s jurisdictional holding as a mere "assum[ption]." 195 F.2d at 615.[4] Even if it were true, however, that the Court had merely assumed that New York City was amenable to suit, *Wickman*'s holding would still be infirm because *Wickman* did not mention—let alone attempt to distinguish—this Court's controlling decisions in *Hopkins* and *Lincoln County*. *Wickman* was thus a slim reed upon which to rest so broad a holding as that found in the decision below.

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[4] Both *Wickman* and the decision below sought to evade *Workman*'s reach by relying upon *Ex parte State of New York, No. 1*, 256 U.S. 490, where this Court distinguished *Workman* on the ground that the case "dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of defendant." *Id.* at 499. Although it is true that the primary issue in *Workman* was whether admiralty law preempted state-conferred immunity, the necessary predicate to that analysis was the Court's determination that municipalities do not enjoy any federal sovereign immunity from suit. *See Workman*, 179 U.S. at 565.

III. GEORGIA LAW CANNOT ALTER THE SCOPE OF FEDERAL ADMIRALTY JURISDICTION

The court of appeals' reliance upon its earlier decision in *Kitchen*, 6 F.3d 727, suggesting that Chatham County is entitled to immunity under the Georgia Constitution is flatly inconsistent with this Court's recognition that "[m]unicipal defenses—including an assertion of sovereign immunity—to a federal right of action are . . . controlled by *federal* law." *Owen*, 445 U.S. at 648 n.30 (emphasis added). Indeed, this Court has consistently held that state law cannot limit federal courts' jurisdiction to hear suits against counties.

In *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118 (1868), for example, the Court concluded that an Illinois county was amenable to suit in federal court, even though an Illinois statute purported to restrict claims against counties to the state circuit courts. *Id.* at 122. The Court explained that "no statute limitation of suability can defeat a jurisdiction given by the Constitution." *Id.* Moreover, in *Chicot County v. Sherwood*, 148 U.S. 529 (1893), the Court held that an Arkansas statute providing that counties could only be sued by prescribed methods in state court did not bar suit against an Arkansas county in federal court because the "jurisdiction of the federal courts is not to be defeated by such legislation." *Id.* at 534.

These holdings apply with equal force in the admiralty setting. The general maritime law is federal in nature, *Yamaha Motor Corp., U.S.A.*, 516 U.S. at 206, and thus only the federal law of sovereign immunity determines whether a government entity can assert immunity as a defense to an admiralty claim. *See Ex parte State of New York, No. 1*, 256 U.S. at 497 (looking to the United States Constitution—not state law—to decide whether a State was entitled to sover-

eign immunity in an admiralty action).[5] Even the Supreme Court of Georgia has acknowledged that a county's state-law immunity cannot shield Chatham County from admiralty liability. *See Hines*, 604 S.E.2d at 191 (holding that the sovereign immunity conferred by the Georgia Constitution does not immunize Georgia political subdivisions from suits in admiralty because "state-conferred immunity is preempted" by federal law).

The Supreme Court of Georgia's recognition that state immunity law presents no barrier to the assertion of admiralty jurisdiction was mandated by *Workman*, which held that a New York law exempting municipalities from liability did not apply in an admiralty action against New York City. 179 U.S. at 590-91. The Court explained that it is "settled that the local decisions of one or more States cannot, as matter of authority, abrogate the maritime law" because doing so would "destroy the symmetry and efficiency of that law by engrafting therein a principle which violates the imperative command of such law that admiralty courts must administer redress for every maritime wrong." *Id.* at 563. If state-law provisions affording municipal corporations sovereign immunity were given effect in admiralty matters, the maritime law governing municipalities' liability would become "one thing in one port of the United States and a different thing in some other port"—a result that it is utterly inconsistent with the objective of uniformity that animates federal maritime law. *Id.* at 558.

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[5] Of course, particular state law may be relevant to the extent that it bears on whether the defendant qualifies as an arm of the State. *See Doe*, 519 U.S. at 429 n.5 ("Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State . . . is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character.").

The Georgia constitutional provision purporting to afford counties sovereign immunity, *see* Ga. Const. art. I, § 2, ¶ 9(e), therefore cannot be given effect in federal court because doing so would contradict the well-settled federal law of sovereign immunity and—by allowing state law to limit the admiralty jurisdiction that Article III confers on federal courts—would undermine the uniformity of the general maritime law.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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County, for the building and maintenance of bridges over navigable waters. They are collected and reprinted in the appendix to this brief. Additionally, the Act of Congress of March 23, 1906, c. 1130, § 1, 34 Stat. 84 (1906), 33 U.S.C. § 491, is also relevant to this case, reprinted at Resp. Br. App. 1.

STATEMENT

1. Causton Bluff Bridge[1] ("Bridge") is a drawbridge which is owned, operated and maintained by Respondent Chatham County ("County"). J.A. 39a. The Bridge is permanently connected to the roadway of Islands Expressway. Id. Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. J.A. 39a, 42a.

The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. J.A. 39a. Although the parties and lower courts have referred generically to an "intercoastal waterway," the federal regulation that the parties agree applies to the Bridge is entitled "Atlantic Intracoastal Waterway, Savannah River to St. Mary's River." 33 C.F.R. § 117.353(b). J.A. 50a, 54a. The Wilmington River is a part of the Atlantic Intracoastal Waterway and is maintained by the Army Corps of Engineers. See *Williams v. United States*, 581 F. Supp. 847, 848 (S.D. Ga. 1983), aff'd, 747 F. 2d 700 (11th Cir. 1984).

The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intracoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half

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[1] The Bridge has also been known as the Sam Varnedoe Bridge.

Supreme Court, U.S.
FILED
FEB 2 - 2006
OFFICE OF THE CLERK

No. 04-1618

In The Supreme Court of the United States

NORTHERN INSURANCE COMPANY OF NEW YORK,

Petitioner,

v.

CHATHAM COUNTY, GEORGIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED FOR REVIEW

Whether an entity that does not qualify as an 'arm of the State' for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit?

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, the current Petitioner was subrogated to the rights of James K. Ludwig, Jr. and Carol C. Ludwig. In the proceedings below, and upon certiorari to this Court, the named insurer was Zurich Insurance Company. See 126 S. Ct. 477 (2005); J.A. 9a, 70a, 81a .

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RESPONDENT'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, *Zurich Insurance Co. v. Chatham County, Georgia*, No. 04-13308 (11th Cir. Jan. 28, 2005), is unreported and is reprinted at J.A. 81a. The District Court's Order of June 28, 2004, is unreported and reprinted at J.A. 70a.

STATEMENT OF JURISDICTION

Petitioner has been granted review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of January 28, 2005. J.A. 81a. Rehearing was denied by the Eleventh Circuit on March 4, 2005. J.A. 86a. A timely petition for writ of certiorari was filed June 1, 2005. This Court granted the Petition for Writ of Certiorari on October 11, 2005. The Supreme Court has jurisdiction to review cases from the courts of appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the U.S. Constitution provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This case implicates the construction of a number of Georgia constitutional provisions and statutes, bearing on the delegation of authority, by the State of Georgia to Chatham

of the span. J.A. 39a-40a. The Bridge permits passage of light pleasure craft, tug and tow vessels and commercial vessels over the waters of the intracoastal waterway of the Wilmington River. J.A. 40a. The County employs bridge tenders to open the bridge for that purpose. Id.

The County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. J.A. 40a. There is no charge to anyone for crossing the Bridge or traversing the waters underneath. Id. Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. Id. The County derives no income from operating and maintaining the Bridge. Id.

The Bridge was constructed in 1963 when the Islands Expressway was constructed as a two-lane roadway. J.A. 40a. In the 1980's, a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. Id. There has been no additional construction or reconstruction to the Bridge since the 1980's. Id. The construction of the Bridge was approved by the Chief of Engineers and by the Secretary of the Army pursuant to the Federal Bridge Act of 1906, 33 U.S.C. § 491; Resp. Br. App. 1.

2. On October 6, 2002, James K. Ludwig was traveling in his vessel, The LOVE OF MY LIFE, on the intracoastal waterway of the Wilmington River. J.A. 43a. Mr. Ludwig contacted the operator of the Bridge and requested that it be raised to permit his vessel to transit the waters beneath the Bridge. Id.

The tender opened the Bridge pursuant to Mr. Ludwig's request. J.A. 44a. The tender noticed that the northwest span of the bridge was drifting down and immediately tried to make radio contact with Captain Ludwig. Id. The tender was unable

to contact the vessel because the Captain turned off his radio prior to entering the Bridge operational area. Id. The tender stopped the span and started it back up; however, The LOVE OF MY LIFE hit the span. J.A. 44a. The vessel did not enter the channel of the Bridge, but deviated to the southwest, striking the Bridge. Id.

3. The federal district court granted the County's motion for summary judgment, holding that the County was entitled to residual common law sovereign immunity. J.A. 70a-78a. The Eleventh Circuit affirmed. J.A. 81a-85a.[2]

That court of appeals adopted the district court's analysis of "common law" sovereign immunity, as distinct from Eleventh Amendment immunity. J.A. 80a, 56a-69a. The Eleventh Circuit held that a county could be deemed an "arm of the State," for sovereign immunity purposes, in certain exceptional cases where a State had delegated certain sovereign interests over the construction or maintenance of infrastructure on navigable waters. See J.A. 83a-85a.

A timely petition for writ of certiorari followed. This Court initially granted review without comment, 126 S. Ct. 415 (2005), but then amended the order granting the petition limited to the question as reflected, supra at (i). 126 S. Ct. 477 (2005).

SUMMARY OF THE ARGUMENT

I. The court of appeals held that Chatham County, even though not an "arm of the State" for Eleventh Amendment purposes, was so under principles of residual sovereign

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[2] The Eleventh Circuit had ruled in favor of the County in a substantially identical unpublished opinion, *Continental Ins. Co. v. Chatham County, Georgia*, Case No. 04-10661-F. J.A. 79a-80a.

immunity. The court's holding was limited to the circumstances presented in this case, where a political subdivision is delegated by the State essential functions implicating significant sovereign interests. J.A. 83a-85a. This argument is renewed here.

This Court has never categorically rejected the possibility that a county may be an arm of the State for certain purposes, but has only established an understandable presumption against such a finding. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 124 (1979). Indeed, in many other doctrinal contexts, this Court has recognized State delegations of power to counties, from which sovereign immunity flowed. See *City of Columbus v. Ours Garage & Wrecker Service*, 536 U.S. 424, 428-29 (2002); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991); *Community Communications v. City of Boulder*, 455 U.S. 40, 55 (1982).

Whether this Court applies its strict Eleventh Amendment test for arm of the State determinations, or a more generous standard under its wider sovereign immunity jurisprudence, Respondent qualifies for such status in the situation presented here. First, and most importantly, the State of Georgia expressly delegated its sovereign authority for the maintenance of bridges over navigable waters to its counties. See GA. CONST. art. 9, § 2, ¶ 3(a)(4); O.C.G.A. § 36-14-1. Under Georgia's Constitution and common law, this delegation of power was accompanied by a grant of sovereign immunity to the County. See GA. CONST. art. 1, § 2, ¶ 9(e); *Gilbert v. Richardson*, 264 Ga. 744, 745-6 (1994). This immunity for counties has never been waived by the Georgia General Assembly. As a subsidiary matter, there is also a potential risk, see *Regents of the University of California v. Doe*, 519 U.S. 425, 431 (1997), that State funds would be used to satisfy a

judgment against Chatham County in this case. See O.C.G.A. §§ 32-5-21(3), 32-5-25, 42-4-42(2).

The State of Georgia has delegated to its counties a significant sovereign function in the maintenance of bridges over navigable waters, which "uniquely implicate sovereign interests." *Idaho v. Couer D'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997). This Court has always recognized that a State's management of its navigable waters is entitled to substantial deference and sovereign immunity, consistent with federal plenary authority. See *St. Anthony Falls Water-Power Co. v. Board of Water Comm'rs of City of St. Paul*, 168 U.S. 349, 366 (1897); *Ouchita & Mississippi River Packer Co. v. Aiken*, 121 U.S. 444, 448-50 (1887).

II. A narrower ground for holding in favor of Respondent is that counties enjoy residual sovereign immunity in *in personam* admiralty actions. Such residual sovereign immunity extends well beyond the contours of the Eleventh Amendment, see *Alden v. Maine*, 527 U.S. 706, 723, 727 (1999); *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 753 (2002), and is controlled by considerations of common law history, State dignity, and the functional realities of State management of navigable waters (along with lands underlying navigable waters) and the demands for uniformity of the federal maritime law. All these factors militate in favor of Respondent's immunity here.

Historically, counties were never subject to *in personam* admiralty suits for damages arising from the alleged improper maintenance of bridges over navigable waters. In England, admiralty jurisdiction simply did not extend to events occurring "within the body of a county." 15 Rich. II c. 3 (1378). Even more pertinently, in English common law, counties were immune in suits alleging injuries incurred by a member of the public for a county bridge being out of repair, provided the

bridge was operated by the county *pro bono publico*. See *Russell v. Men of Devon*, 100 Eng. Rep. 359 (K.B. 1788). These principles were all substantially adopted in the American law of sovereign immunity in admiralty proceedings. They were not substantially unsettled by this Court's decision in *Workman v. Mayor, Aldermen & Commonalty of the City of New York*, 179 U.S. 552 (1900), and, indeed, were reaffirmed in this Court's later landmark opinion of *In re State of New York*, 256 U.S. 490 (1921).

The dignity interests of States, as noted by this Court in *Federal Maritime Comm'n*, 535 U.S. at 760, and *Alden*, 527 U.S. at 748-49, are certainly advanced by extending counties sovereign immunity in admiralty cases, where the county is exercising core State functions in regard to navigable waters. Confirming such immunity for counties is only sensible, given the threat that entertaining *in personam* admiralty suits can pose to State sovereignty. See *Welch v. Texas Department of Highways & Public Transp.*, 483 U.S. 468 (1987); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 698-99 (1982).

These historical and dignity considerations are confirmed by functional factors. Despite protestations to the contrary, granting Respondent sovereign immunity in this case will not spell the doom of the uniformity of the federal maritime law, for the simple reason that sovereign immunity is jurisdictional and substantive maritime law will be applied, irrespective of the forum Petitioner selects. Indeed, this Court has rejected such uniformity concerns as a ground for refusing sovereign immunity, see *State of New York*, 256 U.S. at 502-03; *Federal Maritime Comm'n*, 535 U.S. at 767-68, and should do so here. Moreover, to deny Respondent immunity will mean that many States will, of necessity, be compelled to reassume control of bridge maintenance (or other infrastructure projects

involving navigable waters) which they had previously delegated to political subdivisions, in order to secure for these operations immunity from suit.

ARGUMENT

I.

A COUNTY ENJOYS ARM OF THE STATE IMMUNITY WHEN IT IS DELEGATED ESSENTIAL FUNCTIONS BY THE STATE IMPLICATING SIGNIFICANT SOVEREIGN INTERESTS.

A. The "Arm of the State" Issue is Properly Before this Court.

The Eleventh Circuit decided the case below, in part, on a narrowly-tailored sovereign immunity analysis, premised on the holding that Chatham County could be considered an "arm of the state" for certain sovereign immunity purposes, even if it could not be so within the literal confines of the Eleventh Amendment. J.A. 83a-85a. Respondent is entitled to renew such an argument here. See *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). This Court has limited its review to a modified Question Presented. See 126 S. Ct. 477 (2005). As the Question is posed by the Court, it does not foreclose Respondent's assertion that it is an "arm of the State" for general sovereign immunity purposes, even if it is not under the Eleventh Amendment.

B. States May Delegate Sovereign Powers to Counties, and, Under Unique Circumstances, Cloak Them with Arm of the State Immunity.

1. Respondent is mindful that generally counties do not enjoy Eleventh Amendment immunity. This Court has held, however, that where a county does truly act as an arm of the State, it is entitled to sovereign immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 124 (1979) (ruling extended to five Pennsylvania counties); see also Erwin Chemerinsky, FEDERAL JURISDICTION 413-14 (2003).

In *Pennhurst*, this Court observed that

> We have held that the Eleventh Amendment does not apply to "counties and similar municipal corporations." *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 280 (1977); see *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). At the same time, we have applied the Amendment to bar relief against county officials "in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). See, e.g., *Edelman v. Jordan*, [415 U.S. 651 (1974)] (Eleventh Amendment bars suit against state and county officials for retroactive award of welfare benefits).

465 U.S. at 124 n.34.

This Court has thus held open the possibility that, under special and unique circumstances, a county or municipal corporation might be recognized as an arm of the State for

purposes of invoking some species of sovereign immunity. This is such a case.

2. The arm of the State doctrine is rooted in federalism's abiding respect for States' absolute discretion to delegate state authority, power, privileges, and immunities to state instrumentalities. *Pennhurst State School & Hosp.*, 465 U.S. at 116-117 ("[T]he Eleventh Amendment's restriction on the federal judicial power is based in large part on 'the problems of federalism inherent in making one sovereign appear against its will in the courts of another.' (quoting *Employees v. Missouri Pub. Health Dept.*, 411 U.S. 279, 294 (1973)); *Fed. Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743, 765 (2002) ("While state sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens, the doctrine's central purpose is to 'accord the States the respect owed them as' joint sovereigns." (quoting *Alden v. Maine*, 527 U.S. 706, 750-51 (1999), and *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993))).

This Court has thus recognized, in other doctrinal contexts, State delegations of sovereign authority to counties, from which there followed immunity consequences.

a. In nearly a hundred years of this Court's jurisprudence, the Court has consistently held that a fundamental principle of federalism is the freedom of States to experiment with different forms of delegation to counties and political subdivisions. This principle of federalism has been especially respected in the sphere of delegation of powers with a federal dimension, such as the regulation of commerce. In *City of Columbus v. Ours Garage & Wrecker Service*, 536 U.S. 424 (2002), this Court held that

> [o]rdinarily, a political subdivision may exercise whatever portion of state power the State, under its own constitution and laws, chooses to delegate to the subdivision. Absent a clear statement to the contrary, Congress' reference to the "regulatory authority of a State" should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts.

Id. at 428-29.

Likewise, in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), this Court observed that "[t]he principle is well settled that local ' "governmental units" are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them' . . . in its absolute discretion." Id. at 607-08 (quoting *Sailors v. Bd. of Ed. of Kent City*, 387 U.S. 105, 108 (1967), which quoted *Reynolds v. Sims*, 377 U.S. 533, 575 (1964), which in turn was quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)). See also *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978).

b. This Court has also respected this principle of federalism in the area of antitrust immunity. See *Parker v. Brown*, 317 U.S. 341, 350-351 (1943). In *Community Communications v. City of Boulder*, 455 U.S. 40 (1982), the Court confirmed that a municipality may be eligible for state action immunity from antitrust liability, but only to the extent that it acts pursuant to a clearly articulated and affirmative delegation of authority by the State. See id. at 55.

This line of cases emphasized the endowment of immunity on a county or political subdivision, in cases where a State effectively delegated "a traditional governmental

function" to a county through a "clear articulation and affirmative expression" of such a delegation. See id.; *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978); *Parker*, 317 U.S. at 351 (limitation of the exemption to "official action directed by a state"). Although counties are "not themselves sovereign; they do not receive all the federal deference of the States that create them," this Court has reconciled the grant of sovereign immunity to counties in certain situations with the broader proposition that counties are not normally "arms of the State" for Eleventh Amendment purposes. *City of Lafayette*, 435 U.S. at 412. They may be arms of the State under unique circumstances when an express delegation of State authority has been made. See *Pennhurst*, 465 U.S. at 124 n.34.

C. Chatham County Qualifies as an Arm of the State, Under the Unique Circumstances of this Case, Because It was Expressly Delegated an Essential Sovereign State Function and State Funds May be Used to Satisfy an Adverse Judgment.

Whether a State instrumentality is an arm of the State – at least under the Eleventh Amendment – is a federal question, but one that must be answered by looking to the provisions of State law that define "the relationship between the State and the entity in question." *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997). See also *Mount Healthy*, 429 U.S. at 280 (stating as a first factor that the arm of the State determination depends upon the nature of the entity created by state law); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401-02 (1979) (looking first to corporate relationship between the bistate entity in question and the compacting States, and then to the function performed by the entity); and *Lincoln County v. Luning*, 133 U.S. 529, 530

(1890) (Nevada constitution explicitly provided for the liability of counties to suit).

The Court has applied a variety of considerations in its arm of the State determinations. Such factors include whether the State is a real party in interest and whether the State constitution provides for counties' liability to suit. See id. at 530-31. Additional details are the nature of the entity created by State law, the degree of supervision by the State, and whether an entity has the power to raise its own funds. See *Mount Healthy*, 429 U.S. at 280. Lastly, it might be relevant whether a county was bestowed corporate powers, deemed a "local public entity," is liable for judgments, authorized to own and sell propety, and authorized to issue bonds. See *Moor v. County of Alameda*, 411 U.S. 693, 719-20 (1973).

A review of these Supreme Court precedents demonstrates that two factors are most often dispositive of "arm of the State" determinations for Eleventh Amendment purposes: (a) whether State law delegates to the instrumentality a sovereign State function and (b) whether State funds may potentially be used to satisfy an adverse judgment. Although precedent suggests a presumption against a county operating as an arm of the State for Eleventh Amendment purposes, Respondent submits that, as with the presumption against a bistate entity operating as an arm of the State, this presupposition may be overcome to afford arm of the State immunity where there is good reason to believe that "the State[] structured the [delegation] to enable [the entity] to enjoy the special constitutional protection of the States themselves." *Port Authority Trans-Hudson Corp. v. Hess*, 513 U.S. 30, 43-44 (1994) (quoting *Lake Country Estates, Inc.*, 440 U.S. at 401). The surmountability of this presumption through arm of the State status is acknowledged in *Moor v. Alameda County*. "[T]his Court has recognized that a political subdivision of a

State, unless it is simply the 'the arm or alter ego of the State,' is a citizen for diversity purposes." *Moor*, 411 U.S. at 717.

Finally, the analytical framework for arm of the State determinations may well be broader outside the confines of the Eleventh Amendment, as here. Where a State's residual sovereign immunity is at issue, the guiding inquiry should be whether the State has made a conscious choice, through an effective delegation of a core sovereign power to a county, thereby seeking to cloak that political subdivision with immunity from certain types of suits. Viewed in this way, whether or not State funds may potentially be used to pay a judgment against a county, matters rather less than the intent of the State in delegating a core governmental function to a county.

In this case, the Court need not make a sweeping declaration as to the contours of "arm of the State" status in non-Eleventh Amendment contexts. Chatham County qualifies as an "arm of the State" under any set of principles that exalts function over form, and eschews any categorical rejection of sovereign immunity for State political subdivisions, just because they are such.

D. Chatham County Was Expressly Delegated State Authority Over The Maintenance of Bridges, an Essential Sovereign Function.

1. An Express Delegation Was Accomplished Under the Georgia Constitution and Statutes, Resulting in Immunity Under Georgia Law.

The State of Georgia recognizes Chatham County as part of the sovereign power of the state, "clothed with public duties which belong to the state. . . ." *Georgia Department of Corrections v. Chatham County, Georgia*, 274 Ga. App. 865,

866, 619 S.E. 2d 373, 374 (2005). The County acts as a State agent for the public at large by performing the governmental function of operating and maintaining the Causton Bluff Bridge pursuant to explicit authority delegated by the State.

The State of Georgia has vested the County with explicit State sovereign power by granting the County the authority to build bridges over navigable waters. O.C.G.A. § 36-14-1 provides:

> The consent of the state is given to and authority is vested in the county governing authority to erect bridges across the navigable streams that lie wholly within the state, whenever in the judgment of the county governing authority the public interest may be subserved thereby, upon its compliance with the law of Congress requiring the approval of the secretary of transportation and the chief of engineers of the United States, as embodied in the statutes of the United States passed by the Fifty-fifth Congress and approved March 3, 1899.

See id.; Resp. Br. App. 6-7.

The County has been delegated power by the State to operate, construct and maintain bridges. Georgia Constitution Article 9, § 2, ¶ 3(a)(4), authorizes counties to provide for street and road construction and maintenance. This paragraph also reserves the right of the Georgia General Assembly to enact general laws and to regulate, restrict, or limit the exercise of this power. GA. CONST. art. 9, § 2, ¶ 3 (c) - (d); Resp. Br. App. 2-3. Chatham County has explicit authority under its Enabling Act to "establish, alter, or abolish public roads, private ways, bridges, and ferries, according to law." Georgia Laws 1984, at 5050, 5071, § 25(6); Resp. Br. App. 7.

The General Assembly has exercised its right to enact general laws regarding bridges. Counties are authorized to acquire property for public road purposes. O.C.G.A. § 32-3-1(a). "Public road purposes" includes bridges. O.C.G.A. § 32-3-1(b); Resp. Br. App. 7-8. O.C.G.A. § 32-4-42 sets forth the powers of counties regarding county road systems and refers to public roads. The definition of "public road" includes bridges. O.C.G.A. § 32-1-3(24)(B); Resp. Br. App. 13.

Georgia's legislature has prescribed the duties of counties with respect to county road systems. O.C.G.A. § 32-4-41; Resp. Br. App. 13-15. These duties include such things as planning, constructing, and maintaining an adequate road system; having control and responsibility for all construction, maintenance, and other work, administering funds for the road system from whatever source; and determining the maximum load for bridges in the county. Id.

The General Assembly has also provided a list of the county's powers relating to the county road system. O.C.G.A. § 32-4-42; Resp. Br. App. 8-13. Some county powers include: authority to enter into contracts for building or maintaining public roads; authority to accept and use federal and state funds to meet requirements of federal or state aid programs; ability to acquire real property; ability to enter on any lands of county for surveys and examinations; authority to employ and pay people needed for building, maintaining, operating a road system; ability to grant utility permits; authority to purchase supplies; and authority to levy and collect taxes. O.C.G.A. § 32-4-42 (1) - (8).

In Georgia, the right of taxation is a sovereign power that is always under the complete control of the State, unless the Georgia Constitution provides otherwise. GA. CONST. art. 7, § 1, ¶ 1; Resp. Br. App. 2. The State authorizes counties to exercise the State's taxation power to levy and collect taxes to

build and repair bridges. O.C.G.A. § 48-5-220(4); O.C.G.A. § 32-4-42(8); Resp. Br. App. 11-12, 16.

The State of Georgia has articulated a clear public interest in the construction and maintenance of bridges and roads. See O.C.G.A. § 32-3-1(b) (which refers to the development, growth, or enhancement of the public roads of Georgia); Resp. Br. App. 7. This interest is more pronounced because the Bridge at issue in this case traverses a navigable water. Chatham County serves both State and federal interests in operating and maintaining the Bridge which crosses navigable waters. See 33 C.F.R. § 117.353(b) (which specifically includes the Causton Bluff Bridge as a drawbridge regulated by the United States). Federal regulations provide that "[p]ublic vessels of the United States, tugs with tows, and vessels in a situation where a delay would endanger life or property shall, upon proper signal, be passed through the draw of each bridge in this section at any time." 33 C.F.R. § 117.353(a).

The United States has the primary jurisdiction to regulate drawbridges across the navigable waters of the United States. See 33 C.F.R. § 117.1. In fact, the note to this provision effectively precludes local regulation. See id. ("The primary jurisdiction to regulate drawbridges across the navigable waters of the United States is vested in the Federal Government. Laws, ordinances, regulations, and rules which purport to regulate these bridges and which are not promulgated by the Federal Government have no force and effect."). The U.S. Coast Guard has the enforcement power over the Causton Bluff Bridge. See 33 C.F.R. § 117.49.

2. Under Georgia Law, Chatham County is Entitled to Sovereign Immunity for Claims Arising out of the Construction and Maintenance of the Bridge.

a. Chatham County's sovereign immunity derives from the common law which pre-dates Eleventh Amendment immunity. The common law doctrine of sovereign immunity, adopted by the State of Georgia in 1784,[3] prior to the adoption of the U.S. Constitution, protected governments at all levels from unconsented-to legal actions. See *Gilbert v. Richardson*, 264 Ga. 744, 745-746, 452 S.E. 2d 476, 477-78 (1994). The doctrine was "imbedded in the common law of England at the time of the American Revolution." *Crowder v. Department of State Parks*, 228 Ga. 436, 439, 185 S.E. 2d 908, 911 (1971). The General Assembly of Georgia embraced the doctrine when it adopted the common law of England in 1784. Id. At common law, counties were not liable for damages resulting from the failure to repair bridges. *Millwood v. DeKalb County*, 106 Ga. 743, 32 S.E. 577 (1899) (citing *Russell v. Men of Devon*, 2 Term R. 667, 100 Eng. Rep. 359 (1788)).

The County's sovereign immunity as a subdivision of the State has had statutory authority since the Code of 1895 in Political Code § 341, subsequently codified as Code § 23-1502. Resp. Br. App. 16. See *Revels v. Tift County*, 235 Ga. 333, 333-334, 219 S.E. 2d 445, 446 (1975). Code § 23-1502 (currently codified at O.C.G.A. § 36-1-4) provides that "[a] county is not liable to suit for any cause of action unless made so by statute." See also *Revels*, 235 Ga. at 333-334, 219 S.E. 2d at 446. The

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[3] The U.S. Constitution was effective March 1789 after nine States ratified it in 1788. *Owings v. Speed*, 18 U.S. 420, 422-423 (1820). The Eleventh Amendment was ratified in 1798. *State of Louisiana v. Texas*, 176 U.S. 1, 16 (1900).

State's sovereign immunity was, at least until 1974, a judicially created rule. *Crowder*, 228 Ga. at 439-440, 185 S.E. 2d at 911; *Nelson v. Spalding County*, 249 Ga. 334, 335, 290 S.E. 2d 915, 918 (1982).

b. Common law sovereign immunity was given constitutional status in Georgia in 1974. *Gilbert*, 264 Ga. at 745, 452 S.E. 2d at 478 n.2. The State was absolutely immune from suit until 1983 when an amendment to the Georgia Constitution was approved waiving the sovereign immunity of the State or any of its departments and agencies in actions for which liability insurance protection was provided. Id. at 745-746, 452 S.E. 2d at 477-479. Counties were included in the 1983 amendment's reservation of immunity to the State or any of its departments and agencies. See *Toombs County v. O'Neal*, 254 Ga. 390, 391, 330 S.E. 2d 95, 96-98 (1985). A revision to the Georgia Constitution in 1983 authorized the State legislature to waive the immunity of counties by law. See GA. CONST. 1983, art. 9, § 2, ¶ 9; Resp. Br. App. 3; *Gilbert*, 264 Ga. at 745-746, 452 S.E. 2d at 478, n.3. The 1991 amendment to the Georgia Constitution extended sovereign immunity "to the state and all of its departments and agencies." Id. at 746, 452 S.E. 2d at 478. Counties are included. Id. at 747, 452 S.E. 2d at 479.

The 1991 amendment to the Georgia Constitution provides in relevant part:

> Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

GA. CONST. art. 1, § 2, ¶ 9(e); Resp. Br. App. 2.

It is clear that counties are included as departments and agencies of the State and therefore have the State's sovereign immunity. *Gilbert*, 264 Ga. at 747, 452 S.E. 2d at 479. See also *Thomas v. Hospital Authority of Clarke County*, 264 Ga. 40, 42, 440 S.E. 2d 195, 196 (1994) (specifically identifying counties as departments or agencies of the State); *Wojcik v. State*, 260 Ga. 260, 262, 392 S.E. 2d 525, 527 (1990) (which notes that "as a political subdivision of the state, a county functions as an instrumentality of state government at a more rudimentary level than does a municipal corporation.")

Counties have historically been recognized as State agencies in Georgia with a limited ability to be sued. Although there is a statute, originally adopted in 1863, which provides that counties may sue and be sued,[4] the State has consistently not authorized counties to be sued except when specifically authorized by law because counties "are political divisions, exercising a part of the sovereign power of the State." *Millwood*, 106 Ga. at 746, 32 S.E. at 578.

Since the sovereign State cannot be sued without its consent, counties as political subdivisions of the sovereign State may not be sued without the consent of the State, their creator. *Tounsel v. State Highway Department of Georgia*, 180 Ga. 112, 116, 178 S.E. 285, 287-288 (1935). Counties provide a local mechanism for the State to govern. *Millwood*, 106 Ga. at 744, 32 S.E. at 577. Although counties have corporate status, they are not viewed by the State as "ordinary municipal corporations, such as cities and towns." *Millwood*, 106 Ga. at 745, 32 S.E. at 577. Counties "are parts of the sovereign power, clothed with

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[4] This section is currently codified as O.C.G.A. § 36-1-3 and was adopted in 1863 as Code § 463. Resp. Br. App. 16, 17.

public duties which belong to the state, and for convenience divided among local organizations." Id. They "are subdivisions of the state, imposed upon the people for state purposes." Id., 32 S.E. at 578. "Counties are subdivisions of the state government to which the state parcels its duty of governing the people." *Troup County Electric Membership Corporation v. Georgia Power Company*, 229 Ga. 348, 352, 191 S.E. 2d 33, 36 (1972). "They are local, legal, political subdivisions of the state, created out of its territory, and are arms of the state, created, organized, and existing for civil and political purposes, particularly for the purpose of administering locally the general powers and policies of the state." Id.

c. The Georgia Supreme Court in *Millwood* recognized that a Georgia statute authorized counties to be sued for damages caused by neglect to keep bridges in repair. 106 Ga. at 745, 32 S.E. at 578 (citing *Hammond v. Richmond County*, 72 Ga. 188 (1883), and Code § 691, currently codified as O.C.G.A. § 32-4-71; Resp. Br. App. 17-18). The Georgia Constitution explicitly provides that sovereign immunity can only be waived by the General Assembly. GA. CONST. art. 1, § 2, ¶ 9(e); art. 9, § 2, ¶ 9; Resp. Br. App. 2-3.

O.C.G.A. § 32-4-71(b) authorizes counties to be sued for damages for a defective bridge occurring within seven years of the contractor's work on the bridge and its acceptance by the county. Resp. Br. App. 17-18. That Code section does not apply because the time limitation has passed. See J.A. 40a (Drewry Aff. ¶ 7). Therefore, there is no legislative waiver of the County's sovereign immunity in this instance. See *Kordares v. Gwinnett County*, 220 Ga. App. 848, 849-850, 470 S.E. 2d 479, 480-481 (1996).

E. State Funds Could Possibly be Used to Pay a Judgment for Claims Regarding the Bridge.

This Court has held that it is a State entity's potential liability for a judgment that is indicative of Eleventh Amendment immunity. See *Regents of the University of California v. Doe*, 519 U.S. 425, 431 (1997) ("[I]t is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability, that is relevant. . . ."); *Lincoln County*, 133 U.S. at 530-531 (both factors concerned potential liability of the State, as to (1) whether the State is a real party in interest and (2) whether the State constitution provides for counties' liability to suit); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. at 124 (holding that defendants, including five Pennsylvania counties, were entitled to Eleventh Amendment sovereign immunity when funding for the mental retardation programs in question came from the State and then the counties).

Such a potentiality exists in this case for Chatham County to have recourse to use State funds in satisfying any judgment in favor of Petitioner.[5] Under Georgia law, counties receive state funds for public roads. See O.C.G.A. § 42-4-42(2). O.C.G.A. § 32-5-25 allows the State Public Transportation Fund to be used to pay a damage award in relation to a bridge. See id. § 32-5-21(3); Resp. Br. App. 18-19. Grants of state funds to counties for roads and bridges are not "general revenue funds," but can be used for any public purpose, including the payment of a judgment. Id. § 36-17-1;

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[5] Notwithstanding Petitioner's suggestion, Respondent did not concede, in prior proceedings, that State funds could never be used to pay this judgment. Rather, the County specified that a judgment would not be paid out of "general revenue funds" or funds "earmarked" for such a purpose. See J.A. 51a, 55a.

Resp. Br. App. 19. The only prohibition on the use of this fund is for the construction or maintenance of private driveways, roads or bridges; or public roads that have since been abandoned. O.C.G.A. § 32-5-23 (1)-(2). State funds may be granted to counties based upon road mileage for any public purpose. O.C.G.A. § 36-17-1.

Finally, there is no question that where a bridge is designated as part of the State of Georgia's own highway system, the State is obligated to defend an action for negligent bridge maintenance brought against a county, and it could obviously claim both sovereign immunity and Eleventh Amendment immunity. Id. § 32-2-6(a); Resp. Br. App. 19-20. This means that, under Petitioner's argument, whether Eleventh Amendment immunity attaches would depend on a state highway designation. If this case is decided adversely to Respondent, in the future, counties (in Georgia and elsewhere) will simply redesignate county roads or bridges as state infrastructure, in order to secure immunity. This Court should reject the application of such formalisms when designing its sovereign immunity jurisprudence.

F. Maintenance of Bridges Over Navigable Waters is a Uniquely Core, Sovereign Function of the State.

1. Historically, lands underlying navigable waters have been considered as sovereign lands. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). It has been observed that

> The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence "became themselves sovereign; and in that character hold the absolute right to all their navigable waters and

> the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

Id. at 283 (quoting *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842)). This Court's conclusion was based on the principle that "navigable waters uniquely implicate sovereign interests," and an encroachment on such sovereign prerogatives "would be . . . fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." Id. at 284. This principle derives from English law which is founded on the public right to navigation and the long-held concept that submerged lands are "tied in a unique way to sovereignty." Id. at 284-85.

The State of Georgia recognizes its sovereign power over tidal waters, navigable waters, and lands underlying navigable waters. The Wilmington River, which the Bridge spans, is a tidal river. *Dorroh v. McCarthy*, 265 Ga. 750, 462 S.E. 2d 708-709 (1995). O.C.G.A. § 52-1-2 provides:

> The General Assembly finds and declares that the State of Georgia became the owner of the beds of all tidewaters within the jurisdiction of the State of Georgia as successor to the Crown of England and by the common law. . . . The General Assembly further finds that the State of Georgia, as sovereign, is trustee of the rights of the people of the state to use and enjoy all tidewaters which are capable of use for fishing, passage, navigation, commerce, and transportation, pursuant to the common law public trust doctrine. Therefore, the General Assembly declares that the protection of tidewaters for use by the state and its citizens has more than local significance, is of equal

> importance to all citizens of the state, is of state-wide concern, and, consequently, is properly a matter for regulation under the police powers of the state.

Id.; Resp. Br. App. 4. The State of Georgia has thus explicitly authorized the construction and maintenance of the intracoastal waterway in the State of Georgia by the United States. See O.C.G.A. § 52-3-1 et seq. The construction and maintenance of the intracoastal waterway in the State of Georgia is intended to create a part of the navigable waters of the United States. See id.

2. It is well established that the maintenance of bridges, and highways, is an essential governmental function. This Court held in *Proprietors of Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 438 (1837), that a State's right to build a bridge over a navigable river was an exercise of its sovereign power. In *Atkin v. Kansas*, 191 U.S. 207 (1903), this Court held that

> it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the State invested one of its governmental agencies with power to care for it. Whether done by the State directly or by one of its instrumentalities, the work was of a public, not private, character. . . . We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done.

Id. 222.

This Court has also held that the States' sovereignty interests extend to prescribing the modalities of the maintenance of bridges over navigable waters, and that such matters are reserved to state courts, except where there has been an express preemption of jurisdiction by federal law. In *Ouchita & Mississippi River Packer Co. v. Aiken*, 121 U.S. 444 (1887), the Court ruled that

> [i]n all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such interfere with the regulations made by the state, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded, or for the services rendered under state authority. . . . If the state laws furnish no remedy, – in other words, if the charges are sanctioned by them, – then, as before stated, it is for congress, and not the United States courts, to regulate the matter, and provide a proper remedy.

Id. at 448-50. This deference to State sovereignty interests over navigable waters was elaborated in *St. Anthony Falls Water-Power Co. v. Board of Water Comm'rs of City of St. Paul*, 168 U.S. 349 (1897), where the Court observed that although the United States has jurisdiction over commerce and the navigation of rivers, "[t]he jurisdiction of the state over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this court." Id. at 366; see also *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 405 (1940); *Cardwell v. Americal River Bridge Co.*, 113 U.S. 205, 208-10 (1885); *Escanaba & Lake Michigan Transp. Co. v. City of Chicago*, 107 U.S. 678, 687-88 (1883).

3. These cases establish both a significant set of immunities for State entities in the exercise of sovereign functions in relation to navigable waters, as well as an important limiting principle for this case. State sovereign immunity is recognized in this line of decisions insofar as state courts are granted the power to rule on questions dealing with the maintenance of needful structures over navigable waters. *St. Anthony Falls*, 168 U.S. at 366; *Aiken*, 121 U.S. at 450. Respondent does not dispute Congress's plenary power of regulation and the supremacy of the federal maritime law. Federal maritime law would be applied in state courts or administrative tribunals on the issue of the liability of State political subdivisions for the maintenance of bridges over navigable waters.

These objectives of federalism can be accomplished while accommodating traditional notions of State sovereign immunity. If Congress believes that States are not properly entertaining actions or petitions involving the maintenance of bridges over navigable waters, it can prescribe a special mechanism for relief. Absent such a move, these cases are properly heard in state forums.

Indeed, the special "sovereignty interests" implicated with navigable waters, *Coeur d'Alene Tribe*, 521 U.S. at 284, counsels that this Court could well limit its sovereign immunity holding here precisely to situations where States delegate an essential government function to counties in relation to navigable waters. In such circumstances, the State interests in cloaking their political subdivisions with immunity are clear, express, and limited.

II.

CHATHAM COUNTY ENJOYS RESIDUAL COMMON LAW SOVEREIGN IMMUNITY IN AN *IN PERSONAM* ADMIRALTY PROCEEDING SUCH AS THIS.

A. This Court has Recognized That State Sovereign Immunity Can Extend Well Beyond the Contours of the Eleventh Amendment.

It can hardly be doubted that a State's residual sovereign immunity can extend doctrinally well beyond the limits of the Eleventh Amendment. In *Alden v. Maine*, 527 U.S. 706 (1999), it was noted that "the Court has upheld States' assertions of sovereign immunity in various contexts falling outside of the literal text of the Eleventh Amendment." Id. at 727. Just four years ago, this Court elaborated the point in *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), when it observed that

> the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular, exemplification of that immunity. . . . Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to "address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisolm* decision."

Id. at 753 (quoting *Alden*, 527 U.S. at 723). See also *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("We have understood the Eleventh Amendment to stand not so much

for what it says, but for the presupposition of our constitutional structure which it confirms.").

Likewise, when a State entity asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States. *Alden*, 527 U.S. at 732. *Alden* teaches that it is the State that decides which of its entities is to be granted sovereign immunity. Id. at 730-736.

That leaves the question of what criteria are to be employed to define the contours of the States' common law, residual sovereign immunity under the *Alden* and *Federal Maritime Comm'n* formulations. Respondent would submit that this Court's jurisprudence reveals three relevant touchstones: the historic understanding and expectations of the Constitution's Framers, the dignity interests of the States themselves, and the functional necessity in extending sovereign immunity to particular State functions and activities. All three of these benchmarks strongly militate in favor of Chatham County enjoying sovereign immunity in this *in personam* admiralty proceeding.

B. Counties Have Historically Enjoyed Immunity in *In Personam* Admiralty Actions.

1. This Court has indicated that one reference point for the application of a residual state common law sovereign immunity was the understandings and expectations of the Framers of the Constitution, as conditioned by English common law. See *Alden*, 527 U.S. at 734 ("the contours of sovereign immunity are determined by the founders' understanding, not by the principles or limitations derived from natural law. . . the dissent has offered no evidence that the founders believed sovereign immunity extended only to cases where the sovereign

was the source of the right asserted. No such limitations existed on sovereign immunity in England, where sovereign immunity was predicated on a different theory altogether.").

This Court has observed that the States' common law sovereign immunity derives from a principle of English common law that a lord "could not be sued in his own court." Id. at 734 (quoting 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 465 (3d. ed. 1927)). See also *Nevada v. Hall*, 440 U.S. 410, 415 (1979) ("[The King] can not be compelled to answer in his own court, but this is true of every petty lord of every petty manor.") (quoting 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 518 (2d ed. 1909)).

2. In English law contemporaneous with the Founding, counties could not be sued in a maritime proceeding. There were two analytically distinct reasons for this. The first was that the literal jurisdiction of the Admiralty did not extend landward to terrestrial events occurring in counties, irrespective of the identity of the county as a defendant in the proceeding. The second explanation was that counties had immunity in English common law courts for tort actions involving typical maritime incidents, including the alleged improper maintenance of bridges.

a. In England, before 1776, the jurisdiction of the English High Court of Admiralty did not extend to events occurring "within the body of a county" (*infra corpus comitatus*), even on a navigable water. A statute from the fifteenth year of King Richard II's reign provided

> that of all manner of contracts, pleas and quereles and of all other things done or arising within the bodies of counties, as well by land as by water . . . the admiral's court shall have no manner of cognizance, power nor jurisdiction;

> but all such manner of contracts, pleas and quereles, and all other things rising within the bodies of counties, as well by land as by water, as afore . . . shall be tried, determined, discussed and remedied, by the laws of the land, and not before or by the admiral.

15 Rich. II c. 3 (1378). This was confirmed in William Blackstone's famous treatise on English law, published on the eve of the American Revolution. See 3 William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND *106.

This rule was recognized in countless cases decided by the High Court of Admiralty. See, e.g., *Clarke v. The FAIRFEILD*, 167 Eng. Rep. 559, Burrell 252 (Adm. 1678); *The PUBLIC OPINION*, 166 Eng. Rep. 289, 2 Hagg. 398 (Adm. 1832); *The King v. Forty-Nine Casks of Brandy*, 166 Eng. Rep. 401, 410, 3 Hagg. 257, 282-83 (Adm. 1836); see also George F. Steckley, *Collisions, Prohibitions and the Admiralty Court in Seventeenth-Century London*, 21 LAW & HIST. REV. 41, 64-66 (2003); Charles S. Cumming, *The English High Court of Admiralty*, 17 TUL. MAR. L. J. 209, 223, 234-35 (1993) .

It is important to recognize that this rule against admiralty jurisdiction was recognized in American jurisprudence (both in the colonial period and post-independence), until such time as this Court adopted a test of navigability for admiralty jurisdiction. See *The King v. Oldner & Brilehan*, 2 Va. Colonial Dec. B90, 1739 WL 4 (Va. Gen. Ct. 1739); *United States v. The SCHOONER BETSY*, 8 U.S. (4 Cranch) 443, 447-48 (1808). Even when later bridge allision cases were acknowledged as being within federal admiralty jurisdiction, the question of immunity for States and counties maintaining such bridges was reserved. See *Atlee v. Packet Co.*, 88 U.S. 389, 391 (1874); *City of Boston v. Crowley*, 38 F. 202, 204 (C.C.D. Mass. 1889).

b. Even outside the strictures of admiralty jurisdiction, English courts at the time of the American Revolution held that a county could not be sued for injuries sustained by a county bridge being out of repair. See *Russell v. Men of Devon*, 100 Eng. Rep. 359, 2 Term Reports 667 (K.B. 1788). The rule of *Russell* was based on the fact that County of Devon operated the bridge *pro bono publico*, and not as a proprietorship or for profit. This distinction was affirmed in later English law, see *Mersey Docks & Harbour Board v. Gibbs*, 11 H.L. 685 (1865), as well as in the United States. See, e.g., *Riddle vs. The Proprietors of the Locks and Canals on Merrimac River*, 7 Mass. 169, 187 (1810).

3. It would have thus been well-understood by the members of the Framing generation that counties, as political subdivisions of States, would have been immune from virtually all maritime proceedings, and certainly those involving bridge allisions. Early American decisions reinforced these rulings by recognizing county immunity in *in personam* maritime proceedings, whether initiated within common law or admiralty jurisdiction.

At the time of the Framing, it was recognized that state courts would continue to have jurisdiction over certain maritime causes of action, including actions against state or public entities. See *Scott v. Graves*, 8 Va. 372 (1790); *Nicholson v. The State*, 3 H. & McH. 109 (Gen. Ct. Md. 1792). See also the First Judiciary Act, Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1333(1)), conferring exclusive jurisdiction on the federal courts "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. . . ."

Early state court decisions confirmed that counties could not be sued for the failure to properly maintain bridges or roads.

See *Carter v. Levy Court*, 31 A. 715, 13 Del. (8 Houst.) 14 (Del. Super. Ct. 1887) ("[T[he overwhelming weight of authority seemed to be in favor of the proposition that no action of tort will lie against such a public division of the State as the county or such a body as the Levy Court" arising from the improper maintenance of a bridge). The Massachusetts Supreme Judicial Court in *Hill v. Boston*, 122 Mass. 344 (1877), noted that this rule derived from English common law that no action could be maintained by one of the public in respect of injuries sustained through a public bridge or road being out of repair. See id. at 346 (citing BROOKE'S ABRIDGMENT of Y.B. 5 Edw. 4, at 2, pl. 24 (1466)); see also *Browning v. City of Springfield*, 17 Ill. 142, 143-144 (1855) (collecting cases from Massachusetts, New Hampshire, and New York).

Even in *in rem* admiralty actions, federal courts acknowledged the immunity of counties and municipalities, if the vessel libelled was used exclusively for public purposes. See *The FIDELITY*, 8 F. Cas. 1189, 1191 (C.C.S.D.N.Y. 1879) (citing English cases). All of this historical material, taken together, is strongly suggestive that counties of States have enjoyed sovereign immunity in many different sorts of admiralty proceedings, including *in personam* actions arising from allisions with bridges (or other structures over navigable waters) maintained by counties.

4. Both Petitioner and United States rely extensively on *Workman v. Mayor, Aldermen & Commonalty of the City of New York*, 179 U.S. 552 (1900), for the proposition that counties enjoy no immunity in *in personam* admiralty proceedings. This reliance is misplaced, for a number of reasons.

Workman was concerned with the substantive law of admiralty and implicitly recognized the immunity of States from *in personam* suits in admiralty. The Court in *Workman* focused

on the relevant law to be applied in maritime proceedings involving a vessel owned and operated by a municipality, but did not address the threshold questions of jurisdiction or sovereign immunity. *Workman* is inapposite because it addressed substantive admiralty law, not the Court's power to exercise jurisdiction over the person of the defendant. *Workman* simply held that admiralty law preempted local law and its opinion was limited to the "controlling effect of the admiralty law." Id. at 574.

In *Workman*, a vessel was struck and injured by a steam fire-boat owned by the City of New York. Id. at 553-54. The fire-boat had been called to put out a fire in a warehouse near the pier slip bulkhead when the accident occurred. Id. The district court applied local law, holding that the City was liable. Id. at 555-56. The court of appeals applied alternative principles of local law and held that the City was not liable. Id. at 556-57. Workman contended that even if the City was not liable under local law, the court of appeals erred because the City was liable under maritime law and maritime law should have controlled the determination. Id. at 557.

The issue before this Court was whether local law or maritime law applied and if maritime law applied, whether the City was liable. The Court described the issue before it:

> Does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (art. 3, § 2) upon the courts of the United States?

See id. at 557.

The Court stated that it was settled that "the local decisions of one or more states cannot, as a matter of authority, abrogate the maritime law." Id. at 564. In *Workman*, the admiralty court's jurisdiction over the City was not in question. See id. at 566. The Court stated that the public nature of the service performed by the City's vessel provided no basis for immunity in an admiralty court "where the court has jurisdiction." Id. at 570. The Court stated that since the City was subject to the jurisdiction of the admiralty court, "unlike a sovereign," the City could not escape liability. Id. The Court also noted that a sovereign could escape liability because courts would have no jurisdiction. Id.

On it own terms, then, *Workman* reserved the question of whether a political subdivision of a State was actually exercising sovereign State powers in conducting activities affecting maritime commerce. In any event, the City of New York was arguably not even accomplishing such sovereign functions in *Workman*, insofar as the fireboats at issue in that case were operated in a proprietary fashion. See id. at 564. Besides, the most compelling reason relied upon by the *Workman* Court to allow the *in personam* action in the case was to maintain the symmetry in admiralty law that would otherwise be destroyed if states were able to unilaterally extend immunity to state entities. See id. at 559. This uniformity rationale is not applicable here, for reasons that will be explained more fully, *infra*, at § II.D.

Workman dealt with a city corporation, whereas the case law pre-existing *Workman* and afterwards prescribed a different result for counties. See *The ALEX Y. HANNA*, 246 F. 157, 158-61 (D. Del. 1917); *The WEST POINT*, 71 F. Supp. 206, 208-11 (E.D. Va. 1947); *Broward County v. Wickman*, 195 F.2d 614, 615 (5th Cir. 1952). The *Wickman* case, relied upon by the court below in ruling in favor of Respondents, see J.A. 83a-84a, is

thus not an isolated or aberrant decision, as Petitioner and United States have suggested.

Georgia law (among those of the several States) has long recognized that counties are more deserving of immunity than municipalities. See *Millwood v. Dekalb County*, 106 Ga. 743, 744 (1899); see also *Heigel v. Wichita County*, 84 Tex. 392, 394 (1892). See also Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L. J. 1, 40 (1924) (making the distinction between counties and cities). It thus may not be necessarily inconsistent to extend greater immunities to counties as political subdivisions in maritime disputes, than to municipalities.

5. Any doubts as to the possible effect of *Workman* on this case were dispelled by this Court's landmark decision in *In re State of New York*, 256 U.S. 490 (1921). *State of New York* not only limited *Workman* to its own terms and facts, see id. at 499, but also established a broader principle of sovereign immunity in admiralty cases. See id. at 497.

State of New York was an *in personam* admiralty action brought against the superintendent of the State of New York after damages were sustained to canal boats. Id. at 495-96. The New York attorney general asserted that a suit against the superintendent was a suit against the State and the court had no jurisdiction over the state which had not consented to be sued. Id. at 496. This Court held that the State's immunity from suit applied in admiralty and therefore the admiralty court had no jurisdiction over the State. Id. at 497-99. The Court emphasized the long-standing principle that a state may not be sued without its consent, citing the Eleventh Amendment which is "but an exemplification" of that fundamental rule. Id. at 497.

This Court distinguished *Workman* in *State of New York*. The Court in *State of New York* rightfully concluded that *Workman* simply was not dispositive on sovereign immunity

issues. The Court stated that *Workman* "dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of defendant, and in the opinion the court was careful to distinguish between the immunity from jurisdiction attributable to a sovereign upon grounds of policy, and immunity from liability in a particular case." Id. at 499.[6] The *State of New York* Court concluded that the symmetry and harmony of the admiralty law "consists in the uniform operation and effect of the characteristic principles and rules of the maritime law as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well." Id. at 502-03.

The *State of New York* decision prescribed a practical approach for the extension of State sovereign immunity in maritime causes of actions to entities like counties. Concerning what is to be deemed "a suit against the state," the Court stated that it "has long been established" that the question is to be determined by "the essential nature and effect of the proceeding, as it appears from the entire record." 256 U.S. at 500. This is the essence of the test advanced here by Respondent: if the County is exercising a delegated function by the State of Georgia, under terms and conditions that the State would be immune if it were the named party, the County is entitled to sovereign immunity.

State of New York also dispensed with the policy rationale advanced in *Workman*, justifying a refusal of sovereign immunity for fear of a lack of uniformity in maritime proceedings. The *State of New York* Court emphasized that whether a tort action was brought in federal court, state court,

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[6] In essence, though unstated, *Workman* stood only as being a reverse-*Erie* case, discussed infra in § II.D.1, and sovereign immunity was not the issue.

or a state's own administrative tribunals (established to handle claims against the State), the substantive law to be applied was the federal maritime law. See 256 U.S. at 502-03.

6. The overwhelming weight of historical authority, *Workman* notwithstanding, is that counties enjoy a residual sovereign immunity in *in personam* admiralty actions, particularly those involving allisions with bridges maintained by such political subdivisions.

C. The Dignity Interest of States is Advanced by Confirming Sovereign Immunity in Admiralty Cases Where a County is Exercising Core State Functions in Regard to Navigable Waters.

This Court has recognized that, aside from its historic attributes, a fundamental imperative of sovereign immunity is protecting the dignity of States and State entities. Recently, in *Federal Maritime Comm'n*, this Court noted that

> [t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. . . . The founding generation thought it "neither becoming nor convenient that the several States of the Union, invested with that *large residuum of sovereignty* which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons."

535 U.S. at 760 (emphasis added) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). This view had been previously enunciated in this Court's *Alden* decision:

> The principle of sovereign immunity preserved by the constitutional design 'thus accords the

> States the respect owed them as members of the federation' . . . . Private suits against nonconsenting states . . . present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' regardless of the forum.

Alden, 527 U.S. at 748-49 (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)); see also id. at 714 (The Constitution reserves to the states "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status."); id. at 733 ("Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design").

Part of the dignity so essential to State sovereignty is that States be allowed to determine which entities delegated core State functions are to be accorded sovereign immunity. Although the idiom of States as laboratories of democracy, see *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), can be subject to abuse and distortion, it has real relevance here. Many States, including Georgia, have experimented with different forms of delegations of authority over the maintenance of roads and bridges to counties and other political subdivisions. These delegations of authority – and the immunity consequences that flow therefrom – are entitled to substantial deference by federal courts. It is entirely reasonable that States may desire that disputes concerning the maintenance of bridges over navigable waters be resolved in their own courts or administrative tribunals, and not in federal court. Such a desire reflects not only the actuation of real State policies, but also the

protection and preservation of the State's dignity in having a particular class of disputes, implicating the State's effective delegation of its power to a political subdivision, resolved in a forum of the State's own choosing.

This is particularly so in the class of *in personam* admiralty cases at issue here. This Court in *Welch v. Texas Department of Highways & Public Transp.*, 483 U.S. 468 (1987), reaffirmed the holding of *State of New York*. Id. at 488-89 ("In *Ex parte New York, No. 1*, 256 U.S. 490 (1921), a unanimous Court held that unconsenting States are immune from in personam suits in admiralty brought by private citizens."). While there has been justifiable controversy as to the contours of State sovereign immunity in *in rem* admiralty actions, see, e.g., *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 504 (1998), this has not been the case for *in personam* maritime proceedings. See *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 698-99 (1982) ("[A]n action – otherwise barred as an in personam action against the State – cannot be maintained through seizure of property owned by the State. Otherwise, the Eleventh Amendment could easily be circumvented . . . .") (opinion of Stevens, J.).

The rationale of Justice Stevens' opinion in *Treasure Salvors* is as applicable here. State sovereign immunity and dignity will be circumvented in cases where a State seeks to make an effective delegation of maritime authority to a political subdivision, only to have it frustrated by overly-literal or highly-technical limitations on a grant of immunity. The position taken here by Respondent is thus entirely consistent with this Court's teachings in *Federal Maritime Comm'n* and *Alden*, and the County is entitled to the same dignity interests afforded to the State in these circumstances.

D. No Derogation of the Uniformity of Maritime Law Will Occur Here if Chatham County is Accorded Sovereign Immunity, and the Functional Purposes of Sovereign Immunity Will be Advanced by Such a Recognition.

1. Granting Sovereign Immunity to Counties in *In Personam* Admiralty Actions Will Not Disrupt the Uniformity of the Federal Maritime Law.

Both Petitioner and United States argue that granting Chatham County sovereign immunity in this case will result in an untoward challenge to the uniformity of federal maritime law. This position is meritless.

a. This precise argument has been presented to – and rejected by – this Court, not once, but twice, the latest instance being just a handful of years ago. As noted above, this Court in *Workman* suggested that a reason to notionally refuse the City of New York immunity in an admiralty proceeding was to ensure the uniformity of the substantive maritime law. But, in *In re State of New York*, this Court repudiated that notion in an analysis that is worth reprinting at length:

> There is no substance in the contention that this result enables the state of New York to impose its local law upon the admiralty jurisdiction, to the detriment of the characteristic symmetry and uniformity of the rules of maritime law insisted upon in *Workman* . . . The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well. It is not inconsistent in

> principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.

256 U.S. at 502-03 (citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917); *Union Fish Co. v. Erickson*, 248 U. S. 308, 313 (1919); *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 160 (1920); *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 382 (1918)). In short, this Court concluded in *State of New York* that the objective of the uniformity of the substantive federal maritime law would not be frustrated by a grant of sovereign immunity to a State entity, because state courts and tribunals would still be expected to apply federal maritime law in any controversy.

If that were not enough, Petitioner's argument was raised – and disposed of – in this Court's *Federal Maritime Comm'n* decision in 2002. In that instance, it was the United States that raised the specter of dis-uniformity of the maritime law as a grounds for allowing federal administrative proceedings against State entities, at the instance of private parties. This Court made short work of this contention:

> The FMC maintains that sovereign immunity should not bar the Commission from adjudicating Maritime Services' complaint because "[t]he constitutional necessity of uniformity in the regulation of maritime commerce limits the States' sovereignty with respect to the Federal Government's authority to regulate that commerce." Brief for Petitioner 29. This Court, however, has already held that the States' sovereign immunity extends to cases

> concerning maritime commerce. See, e.g., *Ex parte New York*, 256 U.S. 490 (1921). Moreover, *Seminole Tribe* precludes us from creating a new "maritime commerce" exception to state sovereign immunity. Although the Federal Government undoubtedly possesses an important interest in regulating maritime commerce, see U.S. CONST., Art. I, § 8, cl. 3, we noted in *Seminole Tribe* that "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area ... that is under the exclusive control of the Federal Government," 517 U.S., at 72. Thus, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." Ibid.

535 U.S. at 767-68.

Whether Chatham County is sued in state court, or must answer for its alleged negligence through an administrative tribunal charged with hearing tort claims against state entities, the same substantive law will be applied: the federal general maritime law. This is the "reverse-*Erie*" principle. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-223, (1986) ("Stated another way, the 'saving to suitors' clause allows state courts to entertain in personam maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards."); *Chelentis v. Luckenbach*, 247 U. S. 372

(1918) (held that under the general maritime law the seaman had no substantive right to recover; that this rule of substantive maritime law applied whether he sued in the state courts or in the court of admiralty).

b. One cannot credibly argue – as Petitioner and United States appear to – that because different results stand to come out of a rule that the rule disrupts the federal uniformity of maritime law. All rules generate different results based on the facts that are applied thereto. The uniformity of the federal general maritime law remains intact so long as one rule is applied uniformly. Indeed, there could be no hope for uniform results with any rule, maritime or otherwise. Respondent submits that the federal general admiralty law properly recognizes a more complete and accurate definition of sovereign immunity for counties defending *in personam* admiralty actions. Including that recognition in the admiralty jurisprudence does not stand to affect how uniformly admiralty law is applied in our interstate and international relations; it only stands to enhance admiralty law's substance while it is uniformly applied. See *Jensen*, 244 U.S. at 215 (discussing the purposes of a uniform body of federal admiralty law).

It is the uniform application and body of law that admiralty exclusivity is concerned with, not uniform results and outcomes. "[F]ederal admiralty law should be a system of law coextensive with, and *operating* uniformly in, the whole country." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (quoting *The LOTTAWANNA*, 88 U.S. 558 (1875)) (internal quotation marks omitted). See also *Lindgren* v. *United States*, 281 U.S. 38, 44 (1930) ("[The Jones] Act is one of general *application* intended to bring about the uniformity in the *exercise* of admiralty jurisdiction required by the Constitution, and necessarily supersedes the *application* of the [] statutes of the several States.") (emphasis added). There is thus no risk

that extending Chatham County immunity in federal court for this bridge allision will result in a denial of justice for Petitioner, or the untoward application of state law.

c. And if all of this were not enough to quell Petitioner's and the United States' fears of the imminent collapse of maritime commerce, there is still more. Even if a direct action against Chatham County were not possible through a private suit brought by Petitioner, the United States could always enforce the applicable provisions of the 1899 Rivers and Harbors Appropriation Act and the 1984 Shipping Act against Chatham County. The United States concedes this. U.S. Br. 2, 25 (citing 46 U.S.C. App. § 1710(a)). It was also precisely the basis for this Court's holding in *Federal Maritime Comm'n*. See 535 U.S. at 756-59.

2. Granting Counties Sovereign Immunity in *In Personam* Admiralty Actions Will Not Rend the Fabric of this Court's Federalism Jurisprudence.

Petitioner argues that granting Chatham County sovereign immunity in this case would "profoundly alter the legal landscape by insulating every manner of political subdivision . . . from federal causes of action." Pet. Br. 20. This "Chicken Little" argument is also meritless; the sky will not fall if Respondent is granted the relief it seeks here. Rather, if Chatham County's position is rejected, it will result in untoward distortions of state administrative practices in regard to management of navigable waters.

Respondent contends that where the State has expressly delegated management of navigable waters (such as bridge maintenance) to a county, the county is entitled to the same immunity afforded the State in an admiralty action. A "navigable waters" exception to the otherwise ostensible rule of no sovereign immunity to counties and political subdivisions is

consistent with this Court's teachings regarding the special sovereignty interests for navigable waters. See *Coeur D'Alene Tribe*, 521 U.S. at 284, 287-88 ("The principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests.").

Any outcome other than the one counseled here by Respondent, would mean that those counties or political subdivisions that have accepted State delegations of authority over core State functions involving navigable waters will return those functions to the State, where they would unquestionably be accorded sovereign immunity. States will have no incentive to experiment with forms of management or regulation of navigable waters functions as delegations of State authority, under the terms Petitioner and United States propose.

Petitioner would have this Court adopt a bright-line rule of rejecting sovereign immunity for counties in all instances. Such a cut-and-dry rule sacrifices the delicate balance between constitutionally created federalism and the dignity interest of a sovereign state for the sake of an overly simplistic rule. In contrast, Respondent's submission here offers a more complete picture of State sovereignty that better acknowledges the interests of polities functioning apart from certain federal intrusions. This case provides an opportunity for the Court to craft a rule that could generate nearly as predictable results, and be applied equally uniformly, while at the same time taking into account a more complete and accurate definition of sovereignty.

Admiralty law achieves the uniform application of a singular body of rules, whereas it can only hope for uniform results. Respondent is not seeking to have some local law apply, which is what this Court's decisions identify as the potential source of disruption of the federal general maritime law. Respondent is simply asking that this Court recognize

what the general federal maritime law has held for centuries: that, based on historical precedent, the dignity interests of States, and the functional necessities of State management of navigable waters, counties enjoy sovereign immunity in *in personam* admiralty proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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February 2006

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[7] Counsel acknowledges the assistance of Brian D. Boone, Charles H. Hooker, and Julie P. Bowling, all of the Emory University School of Law, in the preparation of this Brief.

Appendix

Relevant Federal Statutes and Georgia Constitutional and Statutory Provisions

33 U.S.C. § 491

When, after March 23, 1906, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of Transportation for the Secretary's approval, nor until the Secretary shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of sections 491 to 498 of this title, have been approved by the Secretary it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Secretary. This section shall not apply to any bridge over waters which are not subject to the ebb and flow of the tide and which are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.

Georgia Constitution Article 1, § 2, ¶ 9 (e)

Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

Georgia Constitution Article 7, § 1, ¶ 1

The state may not suspend or irrevocably give, grant, limit, or restrain the right of taxation and all laws, grants, contracts, and other acts to effect any of these purposes are null and void. Except as otherwise provided in this Constitution, the right of taxation shall always be under the complete control of the state.

Georgia Constitution Article 7, § 3, ¶ 1

No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.

Georgia Constitution Article 9, § 2, ¶ 3 (a)(4)

(a) In addition to and supplementary of all powers possessed by or conferred upon any county, municipality, or any combination thereof, any county, municipality, or any combination thereof

may exercise the following powers and provide the following services:

. . . .

(4) Street and road construction and maintenance, including curbs, sidewalks, street lights, and devices to control the flow of traffic on streets and roads constructed by counties and municipalities or any combination thereof.

Georgia Constitution Article 9, § 2, ¶ 3 (c) - (d)

(c) Nothing contained within this Paragraph shall operate to prohibit the General Assembly from enacting general laws relative to the subject matters listed in subparagraph (a) of this Paragraph or to prohibit the General Assembly by general law from regulating, restricting, or limiting the exercise of the powers listed therein; but it may not withdraw any such powers.

(d) Except as otherwise provided in subparagraph (b) of this Paragraph, the General Assembly shall act upon the subject matters listed in subparagraph (a) of this Paragraph only by general law.

Georgia Constitution Article 9, § 2, ¶ 9

The General Assembly may waive the immunity of counties, municipalities, and school districts by law.

O.C.G.A. § 52-1-2

The General Assembly finds and declares that the State of Georgia became the owner of the beds of all tidewaters within the jurisdiction of the State of Georgia as successor to the Crown of England and by the common law. The State of Georgia continues to hold title to the beds of all tidewaters within the state, except where title in a private party can be traced to a valid Crown or state grant which explicitly conveyed the beds of such tidewaters. The General Assembly further finds that the State of Georgia, as sovereign, is trustee of the rights of the people of the state to use and enjoy all tidewaters which are capable of use for fishing, passage, navigation, commerce, and transportation, pursuant to the common law public trust doctrine. Therefore, the General Assembly declares that the protection of tidewaters for use by the state and its citizens has more than local significance, is of equal importance to all citizens of the state, is of state-wide concern, and, consequently, is properly a matter for regulation under the police powers of the state. The General Assembly further finds and declares that structures located upon tidewaters which are used as places of habitation, dwelling, sojournment, or residence interfere with the state's proprietary interest or the public trust, or both, and must be removed to ensure the rights of the state and the people of the State of Georgia to the use and enjoyment of such tidewaters. It is declared to be a policy of this state and the intent of this article to protect the tidewaters of the state by authorizing the commissioner of natural resources to remove or require removal of certain structures from such tidewaters in accordance with the procedures and within the timetable set forth in this article.

O.C.G.A. § 52-3-1

It is the intent and purpose of this chapter to provide for the construction and maintenance by the United States government of the intracoastal waterway and its salt-water tributaries, hereinafter referred to as the intracoastal waterway, from the state boundary line in the Savannah River to the state boundary line in Cumberland Sound, as authorized by the Congress of the United States by the River and Harbor Act approved June 20, 1938, authorizing the construction of the intracoastal waterway to a depth of 12 feet from the Savannah River, Georgia, to Cumberland Sound, Georgia, in accordance with the project described in House Document No. 618, Seventy-fifth Congress, third session, and subject to the conditions set forth in said document, and by the River and Harbor Act approved August 26, 1937, authorizing the construction of a protected route as part of the intracoastal waterway, around St. Andrew Sound, Georgia, to a depth of seven feet in accordance with the project described in Senate Committee Print, Seventy-fourth Congress, first session, and subject to the conditions set forth in that document. The Governor and the Secretary of State are authorized to issue to the United States of America a grant or grants of a perpetual right and easement to enter upon, cut away, and remove any and all of the land, including submerged lands, composing a part of the channel rights of way, anchorage areas, and turning basins as may be required at any time for construction and maintenance of the intracoastal waterway and to maintain the portions excavated, thereby created as a part of the navigable waters of the United States. The Governor and the Secretary of State are authorized to issue to the United States of America a further perpetual right and easement to enter upon, occupy, and use any portion of the land, including submerged land, composing a part of the spoil disposal area not so cut away and converted into public navigable waters

described in this Code section, for the deposit of dredged material and for such other purposes as may be needed in the construction, maintenance, and improvement of the intracoastal waterway, insofar as such lands, including submerged lands, are subject to grant by the State of Georgia. The grant is to be issued upon a certificate showing the location and description of the rights of way and spoil disposal areas furnished to the Governor by the secretary of the army or by any authorized officer of the Corps of Engineers of the United States Army or by any other authorized official exercising control over the construction or maintenance of the projects.

O.C.G.A. § 52-3-12

Neither this chapter, nor any part thereof, nor any grant or deed made under the authority hereof shall operate to divest the State of Georgia of jurisdiction over any lands; and all civil and criminal process issued under the authority of any laws of this state may be executed in or on any part of the lands or premises devoted to the use of the intracoastal waterway or to any use incidental thereto, to the same effect as if this chapter had not been enacted and as if the grant or deed had not been executed.

O.C.G.A. § 36-14-1

The consent of the state is given to and authority is vested in the county governing authority to erect bridges across the navigable streams that lie wholly within the state, whenever in the judgment of the county governing authority the public interest may be subserved thereby, upon its compliance with the law of Congress requiring the approval of the secretary of transportation and the chief of engineers of the United States, as

embodied in the statutes of the United States passed by the Fifty-fifth Congress and approved March 3, 1899.

Georgia Laws 1984, p. 5050, Section 25 (6)

The board of commissioners [of Chatham County] shall have the power to fix and establish by appropriate resolution or ordinance entered on its minutes, policies, rules, and regulations governing all matters over which the board of commissioners has authority as the governing authority of Chatham County. Without limiting the generality of the foregoing, the following powers are vested in the board of commissioners:

. . . .

> (6) To establish, alter, or abolish public roads, private ways, bridges, and ferries, according to law.

O.C.G.A. § 32-3-1 (a)

Any property may be acquired in fee simple or in any lesser interest, including scenic easements, airspace, and rights of access, by a state agency or a county or municipality through gift, devise, exchange, purchase, prescription, dedication, eminent domain, or any other manner provided by law for present or future public road or other transportation purposes.

O.C.G.A. § 32-3-1 (b)

Public road purposes shall include rights of way; detours; bridges; bridge approaches; ferries; ferry landings; overpasses; underpasses; viaducts; tunnels; fringe parking facilities; borrow

pits; offices; shops; depots; storage yards; buildings and other necessary physical facilities of all types; roadside parks and recreational areas; the growth of trees and shrubbery along rights of way; scenic easements; construction for drainage, maintenance, safety, or esthetic purposes; the elimination of encroachments, private or public crossings, or intersections; the establishment of limited-access public roads; the relocation of utilities; and any and all other purposes which may be reasonably related to the development, growth, or enhancement of the public roads of Georgia.

O.C.G.A. § 32-4-42

The powers of a county with respect to its county road system, unless otherwise expressly limited by law, shall include but not be limited to the following:

(1) A county shall have the authority to negotiate, let, and enter into contracts with any person or any agency, county, or municipality of the state for the construction, maintenance, administration, or operation of any public road or activities incident thereto in such manner and subject to such express limitations as may be provided by Part 2 of this article or any other provision of law. A county shall also have the authority to perform such road work with its own forces or with a combination of its own forces and the work of a contractor, notwithstanding any contrary provisions of Chapter 91 of Title 36;

(2) A county shall have the authority to accept and use federal and state funds and to do all things necessary, proper, or expedient to achieve compliance with the provisions and requirements of all applicable federal-aid or state-aid acts and

programs in connection with the county's public roads. Nothing in this title is intended to conflict with any federal law and, in case of such conflict, such portion as may be in conflict with such federal law is declared of no effect to the extent of the conflict;

(3)(A) A county shall have the authority to acquire and dispose of real property or any interest therein for public road purposes, as provided in Article 1 of Chapter 3 of this title and in Chapter 7 of this title. In any action to condemn property or interests therein for such purposes, notice thereof shall be signed by the condemning county; and such notice shall be deemed to be the official action of the county in regard to the commencement of such condemnation proceedings. For good cause shown a county, at any time after commencement of condemnation proceedings and prior to final judgment therein, may dismiss its condemnation action, provided that (i) the condemnation proceedings have not been instituted under Article 1 of Chapter 3 of this title, and (ii) the condemnor has first paid to the condemnee all expenses and damages accrued to the condemnee up to the date of the filing of the motion for dismissal of the condemnation action.

(B) Pursuant to the requirements of Part 2 of this article, a county shall have the power to purchase, borrow, rent, lease, control, manage, receive, and make payment for all personal property, such as equipment, machinery, vehicles, supplies, material, and furniture, which may be needed in the operation of its county road system; to lease, rent, lend, or otherwise transfer temporarily county property used for road purposes, as authorized by law; to sell or otherwise dispose of all personal property owned by the county and used in the operation of the county road system which is unserviceable; and to execute such

instruments as may be necessary in connection with the exercise of the powers described in this subparagraph;

(4) A county and its authorized agents and employees may enter upon any lands in the county for the purpose of making such surveys, soundings, drillings, and examinations as the county may deem necessary or desirable to accomplish the purposes of this title; and such entry shall not be deemed a trespass nor shall it be deemed an entry which would constitute a taking in a condemnation proceeding, provided that reasonable notice of such entry shall be given the owner or occupant of such property, such entry shall be done in a reasonable manner with as little inconvenience as possible to the owner or occupant of the property, and the county shall make reimbursement for any actual damages resulting from such entry;

(5) A county shall have the authority to employ, discharge, promote, set and pay the salaries and compensation of its personnel, and determine the duties, qualifications, and working conditions for all persons whose services are needed in the construction, maintenance, administration, operation, and development of its county road system; to work inmates maintained in the county correctional institution or inmates hired from the Department of Corrections and maintained by the latter; and to employ or contract with such engineers, surveyors, attorneys, consultants, and all other employees as independent contractors whose services may be required, subject to the limitations of existing law;

(6) A county may grant permits and establish reasonable regulations for the installation, construction, maintenance, renewal, removal, and relocation of pipes, mains, conduits, cables, wires, poles, towers, traffic and other signals, and other equipment, facilities, or appliances of any utility in, on, along,

over, or under the public roads of the county which are a part of the county road system lying outside the corporate limits of a municipality. However, such regulations shall not be more restrictive with respect to utilities affected thereby than are equivalent regulations promulgated by the department with respect to utilities on the state highway system under authority of Code Section 32-6-174. As a condition precedent to the granting of such permits, the county may require application in writing specifically describing the nature, extent, and location of the portion of the utility affected and may also require the applicant to furnish an indemnity bond or other acceptable security conditioned to pay any damages to any part of the county road system or to any member of the public caused by work of the utility performed under authority of such permit. At all times it shall be the duty of the county to ensure that the normal operation of the utility does not interfere with the use of the county road system. The county may also order the removal or discontinuance of the utility, equipment, facility, or appliances where such removal and relocation are made necessary by the construction or maintenance of any part of the county road system lying outside the corporate limits of a municipality. In so ordering the removal and relocation of a utility or in performing such work itself, the county shall conform to the procedure set forth for the department in Code Sections 32-6-171 and 32-6-173, except that when the removal and relocation have been performed by the county, it shall certify the expenses thereof for collection to its county attorney;

(7) A county shall have the power to purchase supplies for county road system purposes through the state as authorized by Code Sections 50-5-100 through 50-5-102;

(8) In addition to any taxes authorized by Article 4 of Chapter 5 of Title 48 to be levied and collected for the construction and

maintenance of its county road system and activities incident thereto, a county is authorized to levy and collect any millage as may be necessary for such purposes;

(9) A county may provide for surveys, maps, specifications, and other things necessary in designating, supervising, locating, abandoning, relocating, improving, constructing, or maintaining the county road system, or any part thereof, or any activities incident thereto or necessary in doing such other work on public roads as the county may be given responsibility for or control of by law;

(10) In addition to the powers specifically delegated to it in this title and except as otherwise provided by Code Section 12-6-24, a county shall have the authority to adopt and enforce rules, regulations, or ordinances; to require permits; and to perform all other acts which are necessary, proper, or incidental to the efficient operation and development of the county road system; and this title shall be liberally construed to that end. Any power vested in or duty placed on a county but not implemented by specific provisions for the exercise thereof may be executed and carried out by a county in a reasonable manner subject to such limitations as may be provided by law; and

(11) In all counties of this state having a population of 550,000 or more according to the United States decennial census of 1970 or any future such census, the county governing authority shall be empowered by ordinance or resolution to assess against any property the cost of reopening, repairing, or cleaning up from any public way, street, road, right of way, or highway any debris, dirt, sediment, soil, trash, building materials, and other physical materials originating on such property as a result of any private construction activity carried on by any developer, contractor, subcontractor, or owner of such property. Any

assessment authorized under this paragraph, the interest thereon, and the expense of collection shall be a lien against the property so assessed coequal with the lien of other taxes and shall be enforced in the same manner as are state and county ad valorem property taxes by issuance of a fi. fa. and levy and sale as set forth in Title 48, known as the "Georgia Public Revenue Code."

O.C.G.A. § 32-1-3 (24)(B)

As used in this title, the term:

. . . .

> (24) "Public road" means a highway, road, street, avenue, toll road, tollway, drive, detour, or other way open to the public and intended or used for its enjoyment and for the passage of vehicles in any county or municipality of Georgia, including but not limited to the following public rights, structures, sidewalks, facilities, and appurtenances incidental to the construction, maintenance, and enjoyment of such rights of way:
>
> . . . .
>
> (B) Bridges. . . .

O.C.G.A. § 32-4-41

The duties of a county with respect to its county road system, unless otherwise expressly limited by law, shall include but not be limited to the following:

(1) A county shall plan, designate, improve, manage, control, construct, and maintain an adequate county road system and

shall have control of and responsibility for all construction, maintenance, or other work related to the county road system. Such work may be accomplished through the use of county forces, including inmate labor, by contract as authorized in paragraph (5) of Code Section 32-4-42, or otherwise as permitted by law. Nothing in this paragraph shall be construed to prevent a county from entering into a contract providing for a municipality to maintain an extension of the county road system within the municipal limits;

(2) A county shall control, administer, and account for funds received for the county road system and activities incident thereto from any source whatsoever, whether federal, state, county, municipal, or any other; and it shall expend such funds for and on behalf of the county in connection with the county road system and for any purpose in connection therewith which may be authorized in this title or by any other law;

(3) A county shall inspect and determine the maximum load, weight, and other vehicular dimensions which can be safely transported over each bridge on the county road system and shall post on each bridge and on each approach thereto on the county road a sign containing a legible notice showing such maximum safe limits, each such sign to conform to the department regulations promulgated under authority of Code Section 32-6-50. However, the department is authorized to give technical assistance to counties, when so requested, in carrying out this paragraph. It shall be unlawful for any person to haul, drive, or bring on any bridge any vehicle, load, or weight which in any manner exceeds the maximum limits so ascertained and posted on such bridge; and any person hauling, driving, or otherwise bringing on such bridge any load or weight exceeding the maximum limits so ascertained and posted shall do so at his

own risk; and the county shall not be liable for any damages to persons or property that may result therefrom;

(4) A county shall keep on file in the office of the county clerk, available for public inspection, the map of the county road system prepared by the department as provided for in subsection (a) of Code Section 32-4-2. In addition to keeping on file a map of the county road system, the county shall notify the department within three months after a county road is added to the local road or street system and shall further notify the department within three months after a local road or street has been abandoned. This notification shall be accompanied by a map or plat depicting the location of the new or abandoned road;

(5) A county shall procure the necessary rights of way for public roads of the state highway system within the county in compliance with subsection (e) of Code Section 32-3-3 and Code Section 32-5-25; and

(6) In acquiring property for rights of way for federal-aid highway projects on its county road system, the county shall comply with the requirements of the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, as amended by the Uniform Relocation Act Amendments of 1987, Title IV of Public Law 100-17, and in general shall be guided by the policies applicable to the department as set forth in Code Section 32-8-1.

O.C.G.A. § 48-5-220 (4)

County taxes may be levied and collected for the following public purposes:

. . . .

(4) To build and repair public buildings and bridges.

1895 Political Code § 341

A county is not liable to suit for any cause of action unless made so by statute.

Code § 23-1502

A county is not liable to suit for any cause of action unless made so by statute.

O.C.G.A. § 36-1-4

A county is not liable to suit for any cause of action unless made so by statute.

O.C.G.A. § 36-1-3

Every county is a body corporate, with power to sue or be sued in any court.

Code of 1863 § 463

Every county which has been, or may be, established, is a body corporate, with power to sue or be sued in any court.

Code of 1863 § 691

If the county authorities fail to take the bond required by section 671 of the Code, then the county shall be liable, in the place of the contractor. If injury be done to one by reason of the defective construction of such a bridge, he will be entitled to recover, as against the county whose authorities failed to take the bond referred to, provided his injuries occur within seven years from the date of the construction of the bridge.

O.C.G.A. § 32-4-71

(a) If the payment bond required by paragraph (2) of Code Section 32-4-69 is not taken, the county shall be liable to subcontractors, laborers, materialmen, and other persons, as provided in Part 4 of Article 3 of Chapter 91 of Title 36, for losses to them resulting from failure to take such bond.

(b) If the condition of bridge repair authorized by Code Sectio 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county or counties, provided that the county shall be discharged from all liability upon the inclusion in the performance bond of the aforesaid bridge repair condition.

(c) Nothing in this Code section shall be construed so as to impose personal liability on the county governing authority."

O.C.G.A. § 32-5-25

Whenever property is acquired under subsection (e) of Code Section 32-3-3, all expenses of the acquisition thereof, including the purchase price and all direct and consequential damages awarded in any proceeding brought to condemn any such right of way, shall be paid by the county in which such right of way or portion thereof is situated. When such right of way or portion thereof lies within the limits of a municipality, acquisition expenses shall be paid by such municipality unless the county concerned agrees to procure such right of way on behalf of the municipality. However, nothing contained in this Code section shall prevent the department from using the State Public Transportation Fund to acquire such right of way, to pay any damage awarded on account of the location of any road that is a part of the state highway system, or to assist a county or municipality in so doing. Furthermore, nothing in this Code section shall be construed to authorize an expenditure from the State Public Transportation Fund for the procurement of a right of way for a road to be constructed on a county road system or municipal street system except as otherwise provided by law or by agreement between the federal government and the department.

O.C.G.A. § 32-5-23

Notwithstanding Code Section 32-5-22 and except as expressly authorized elsewhere in this title, no funds from the State Public

Transportation Fund shall be expended for the construction or maintenance of:

(1) Private driveways, roads, or bridges; or

(2) Public roads that have since been abandoned.

O.C.G.A. § 36-17-1

It is declared to be the purpose and intent of the General Assembly that state funds be made available to the governing authorities of the counties of this state to be expended for any public purposes.

O.C.G.A. § 32-2-6 (a)

The department shall defend any action and be responsible for all damages awarded therein in any court of this state against any county under existing laws whenever the cause of action accrues on a public road which at the time of accrual had been designated by the department as a part of the state highway system; provided, however, that no action may be brought under this Code section until the construction of the public road on which the injury complained of occurred has been completed and such public road has been officially opened to traffic as provided in subsection (b) of this Code section. When any such action is brought against a county in any court of this state, it shall be the duty of the plaintiff to provide for service of notice of the pendency of such action against the county upon the department by providing for service of a second original process, issued from the court where the action is filed, upon the commissioner personally or by leaving a copy of the same in the

office of the commissioner in the Department of Transportation Building, Atlanta, Georgia. The service of process in such action upon the county shall not be perfected until such second original process has been served as provided in this Code section. The department shall also have the right and authority to defend, adjust, and settle in the name of such county and on its behalf any claim for damages for which the department ultimately may be liable under this Code section.

(8)

FILED
FEB 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 04-1618

IN THE

Supreme Court of the United States

NORTHERN INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

CHATHAM COUNTY, GEORGIA,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the Brief for Petitioner remains accurate.

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REPLY BRIEF FOR PETITIONER

Confronted with an unbroken line of precedent squarely rejecting the extension of sovereign immunity to counties and other political subdivisions, Chatham County makes no attempt to distinguish—and, indeed, does not even mention—a number of this Court's decisions establishing that counties are not entitled to sovereign immunity. *See, e.g., Jinks v. Richland County*, 538 U.S. 456, 466 (2003) (counties and other "municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit"). The County instead raises two novel—and ultimately insupportable—arguments in defense of the court of appeals' conclusion that it may invoke sovereign immunity as a defense to this admiralty action.

The County first contends that a State's political subdivisions are cloaked in sovereign immunity whenever they exercise delegated state power and whenever there is a "potential risk" that a judgment might be paid from funds received from the State. Resp. Br. at 5. This unconventional understanding of sovereign immunity is premised upon the notion that there are two distinct arm-of-the-state tests—one for cases that fall within the Eleventh Amendment's textual scope and another, purportedly "broader" standard that applies "outside the confines of the Eleventh Amendment." *Id.* at 14. But the County's submission cannot possibly be reconciled with the fundamental principle—recognized even by the County—that sovereign immunity emanates only from the constitutional structure, and that the Eleventh Amendment is merely "'one particular exemplification of that immunity.'" *Id.* at 28 (quoting *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002)). A single sovereign immunity doctrine can give rise to only a single arm-of-the-state test for determining governmental entities' eligibility for immunity. This Court repeatedly has made clear that the

arm-of-the-state test is significantly more stringent than the test that the County here proposes.

Moreover, notwithstanding the County's assertion that its proposed standard would reserve sovereign immunity for "special and unique circumstances," Resp. Br. at 9, the County's proposed framework would, in reality, obliterate the well-established distinction between sovereign States and nonsovereign political subdivisions, and distort the sovereign immunity doctrine beyond recognition. Indeed, adopting the County's boundless notion of sovereign immunity would extend sovereign immunity to *all* political subdivisions—from counties and cities to school boards and local transportation authorities—because all such entities are state-law creations that exercise delegated state power and many (if not all) receive some state funding. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) ("political subdivisions such as cities and counties are created by the State as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them") (internal quotation marks omitted). But this Court has already explicitly and repeatedly rejected such a limitless formulation of sovereign immunity. *See Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400 (1979) (reversing a court of appeals' conclusion that a bistate agency's exercise of delegated state power entitled it to sovereign immunity, because such reasoning "would extend Eleventh Amendment immunity to every bistate agency"). This Court should reaffirm that conclusion here.

As a supposedly "narrower" alternative to its delegated state powers argument, the County also contends that counties enjoy sovereign immunity from all *in personam* admiralty actions. Resp. Br. at 6. But this Court conclusively rejected that claim more than a century ago in *Workman v. City of New York*, 179 U.S. 552 (1900), and the County here suggests no good reason to revisit that holding. Even if *Work-*

man were not controlling—and it surely is—the County offers no plausible rationale for its assertion that political subdivisions should enjoy immunity protections in admiralty suits that are unavailable in other federal jurisdictional settings. The sovereign immunity doctrine applied in admiralty cases is no different from the doctrine applied in federal question cases, *see FMC*, 535 U.S. at 767 (there is no "maritime commerce" exception to state sovereign immunity), and it is beyond serious dispute that counties cannot invoke sovereign immunity in cases arising under "federal question" jurisdiction. *See, e.g., Griffin v. County Sch. Bd.*, 377 U.S. 218, 233 (1964) ("It has long been established that actions against a county can be maintained in United States courts in order to vindicate federally guaranteed rights.").

Ultimately, the County's claim of sovereign immunity cannot be reconciled with precedent or with the constitutional underpinnings of the sovereign immunity doctrine. A straightforward application of this Court's precedents demonstrates that Chatham County is *not* an arm of the State of Georgia and that it therefore is *not* entitled to invoke sovereign immunity in admiralty—or any other federal jurisdictional setting. The judgment of the court of appeals should be reversed.

I. THE EXERCISE OF DELEGATED STATE POWER DOES NOT IMBUE A COUNTY WITH SOVEREIGN IMMUNITY.

1. As this Court recently reaffirmed, "only arms of the State can assert the State's immunity." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. _, slip op. at 2 (2006) (citing *Alden v. Maine*, 527 U.S. 706, 756 (1999)). The County concedes—as it must under both the Question Presented and this Court's precedent—that it is not an arm of the State "for Eleventh Amendment purposes." Resp. Br. at 8. The County nevertheless contends that a more permissive definition of "arm of the State" applies outside of the Eleventh Amendment con-

text and that it is entitled to sovereign immunity under that standard because it exercises delegated state power when operating the Causton Bluff Bridge. *Id.* at 14.

The County does not cite a single decision from this Court to support its contention that the "analytical framework for arm of the State determinations may well be broader outside the confines of the Eleventh Amendment." Resp. Br. at 14. Nor could it. This Court has recognized that sovereign immunity is a unitary doctrine "implicit in the constitutional design," *Alden*, 527 U.S. at 729, and has consistently applied a uniform arm-of-the-state standard, which focuses principally on whether the governmental entity's debts are paid by the State and the degree of political autonomy enjoyed by the entity. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44-45 (1994). This familiar standard has been applied in cases that fall within the Eleventh Amendment's textual scope and cases not explicitly encompassed by the Amendment. *Compare Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997) (Eleventh Amendment case), *with Moor v. County of Alameda*, 411 U.S. 693, 719 (1973) (non-Eleventh Amendment case).

A political subdivision's exercise of delegated state power has never been accorded significant—much less dispositive—weight in the arm-of-the-state inquiry. Indeed, this Court has "consistently refused to construe" sovereign immunity as "afford[ing] protection to political subdivisions such as counties and municipalities, *even though* such entities exercise a 'slice of state power.'" *Lake Country Estates, Inc.*, 440 U.S. at 401 (emphasis added); *see also Hoover v. Ronwin*, 466 U.S. 558, 573 (1984) ("the actions of a municipality are not those of the State itself"). The rule could hardly be otherwise, because counties and other municipal corporations are creatures of state law that necessarily exercise some slice of state authority. To hold such a delegation sufficient to endow entities with sovereign immunity would render the doctrine limitless.

Contrary to the County's submission, neither *City of Columbus v. Ours Garage & Wrecker Service*, 536 U.S. 424 (2002), which addresses preemption under the Interstate Commerce Act, nor *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), which concerns preemption under the Federal Insecticide, Fungicide, and Rodenticide Act, even faintly indicates that the exercise of delegated state power entitles an entity to sovereign immunity. In fact, neither case addresses sovereign immunity in any way. The decisions do no more than recognize a State's well-established right to delegate powers to its political subdivisions, a point that petitioner certainly does not dispute. And the County does not even allude to *Griffin*, 377 U.S. 218, which held that a county that had been delegated the State's authority to oversee public education nevertheless was not entitled to claim sovereign immunity in a suit challenging the county's decision to close its public school system. *Id.* at 223.

Moreover, the Sherman Act cases upon which the County relies to support its contention that sovereign immunity accompanies a delegation of state power, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), are of questionable relevance because the Sherman Act's state-action exception is *not* a doctrine of sovereign immunity. The exception instead derives from this Court's construction of the Sherman Act itself and from the recognition that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain" state action. *Parker v. Brown*, 317 U.S. 341, 350 (1943).

Moreover, to the extent that *City of Lafayette* and *Community Communications* are relevant at all, they actually *undermine* the County's sovereign immunity claim. Indeed, in *Community Communications*, the Court held that a city that exercised delegated "home rule authority"—*i.e.*, *all* of the State's legislative powers over local and municipal affairs—was not entitled to invoke the state-action exception recog-

nized in *Parker. Cmty. Communications Co.*, 455 U.S. at 54. Because "*all* sovereign authority within the geographical limits of the United States resides either with the Government of the United States, or [with] the States of the Union," the Court concluded that the delegation of state power is insufficient to imbue a political subdivision with sovereign attributes, including the right to invoke antitrust immunity. *Id.* at 53 (emphasis added; internal quotation marks omitted); *see also City of Lafayette*, 435 U.S. at 408, 412 n.42 (plurality op. of Brennan, J.) (rejecting the claim that "all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from the antitrust laws," because "political subdivisions are not as such sovereign").[1]

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[1] The County's reliance upon *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), is similarly misplaced. Contrary to the County's characterization of that case, the Court did not even remotely suggest—let alone hold—that "five Pennsylvania counties[] were entitled to Eleventh Amendment sovereign immunity," Resp. Br. at 22, on the basis of "an express delegation of State authority," *id.* at 12. Rather the Court, after acknowledging that the "Eleventh Amendment does not apply to counties and similar municipal corporations," found that a county *official* might be immune from suit where a judgment "would have had essentially the same practical consequences as a judgment against the State itself," *and* immunity was thus necessary "to protect the state treasury from liability." *Pennhurst State Sch.*, 465 U.S. at 123 n.34 (internal quotation marks omitted). In other words, the Court held that a county official might be immune if he could be deemed an arm of the State under exactly the standard that the County here seeks to scuttle. The Court then explicitly declined to address the counties' sovereign immunity claim and instead held that—in light of the State's entitlement to sovereign immunity—an injunction against the county officials would have been an inappropriate exercise of the federal courts' pendent juris-

2. In an apparent effort to take back its concession that it is not an arm of the State for Eleventh Amendment purposes, *see* J.A. 33a, the County now argues—for the first time—that it "[c]ould [p]ossibly" use transportation funds received from the State to pay a judgment in this action. Resp. Br. at 22. This belated argument fails both as a matter of federal law and Georgia law.

Under this Court's decisions, the relevant inquiry for arm-of-the-state purposes is whether a "money judgment against a state instrumentality or official would be *enforceable* against the State," *Regents of the Univ. of Cal.*, 519 U.S. at 430 (emphasis added), not whether the state instrumentality might potentially pay the judgment out of operating funds that it previously received from the State. *See Hess*, 513 U.S. at 46 (concluding that a bistate entity was not an arm of the State because the States had "no legal liability for [its] debts"). Under the County's rationale, *any* school board or local transportation authority that receives state funding would qualify as an arm of the State simply because it "[c]ould [p]ossibly" use some of those funds to pay judgments against it. Resp. Br. at 22. That is not the law. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (holding that a school district was not an arm of the State even though it "receive[d] a significant amount of money from the State"). Rather, this Court's cases make clear that it is the present location—not the ultimate source—of the funds sought by the judgment that matters. *See Hafer v. Melo*, 502 U.S. 21, 30 (1991) (a State's sovereign immunity is triggered only when the requested relief would "'impose a liability which must be paid from public funds *in* the state treasury'") (quoting *Edelman v. Jordan*,

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diction because the relief would necessarily have been "partial and incomplete." *Id.* at 123-24 & n.34.

425 U.S. 651, 663 (1974)) (emphasis added); *see also Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 463 (1945) (finding immunity where the judgment sought would have been "satisfied by funds *in* the state treasury") (emphasis added).

Even if federal law were not sufficient to foreclose it, the County's argument fails also on its own state-law terms. The County argues that its admission below that any judgment against it would not be "satisfied by funds received . . . from the State of Georgia as part of general revenue funds provided to the County," J.A. 51a, is not controlling because it receives grants from the State Public Transportation Fund, which is not a general revenue fund, and Georgia law permits that Fund "to be used to pay a damage award in relation to a bridge." Resp. Br. at 22. This contention, however, finds no support in provisions of Georgia law cited by the County.

As an initial matter, although the County is correct that the Fund is not a general revenue fund,[2] the Department of Transportation (which administers the Fund on behalf of the State) does not appear to be authorized to make general purpose grants out of the Fund to counties at all. *See* Ga. Code Ann. §§ 32-5-21, 32-5-22 (delineating the priority of expenditures from the Fund). Even if the Department is, in fact, permitted to make grants from the Fund to counties, the statutes cited by the County would not allow a grant for the payment of a judgment against the County. Section 32-5-25 pertains only to the payment of expenses relating to the ac-

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[2] A State's general revenue fund is comprised of all public funds "not specifically authorized by the constitution or by statute to be placed in a separate fund, and not given or paid over in trust for a particular purpose." 81A C.J.S. *States* § 383 (2005). By contrast, Georgia law provides that proceeds from the State's motor fuel tax be appropriated to the State Public Transportation Fund. Ga. Const. art. III, § IX, ¶ VI(b); Ga. Code Ann. § 32-5-20.

quisition of a right of way, *see id.* § 32-5-25, and Section 32-5-21(3) simply permits the *Department* to use the Fund "[t]o pay the costs of operating the [D]epartment [of Transportation] and for any emergencies or unusual situations." *Id.* § 32-5-21(3).[3] In any event, even setting aside the County's admissions below, there is nothing in the *record* to support the County's contention that funds appropriated by the State would be used to pay the judgment in this case.

Thus, it is readily apparent that the County does not meet any definition of "arm of the State" ever countenanced by this Court. The State itself is not liable for judgments entered against the County—for actions in admiralty or otherwise—and no money *in* the State treasury will be used to pay any eventual judgment. Moreover, the County operates autonomously and is not subject to the State's day-to-day control. *See, e.g.*, Ga. Code Ann. § 36-5-22.1 (granting each county "exclusive" authority over county property, roads, and taxation); *see also Moor v. County of Alameda*, 411 U.S. 693, 719-20 (1973) (concluding that a county was not an arm of the State where it possessed "independent status" and was not a "mere agent of the State"). This Court has never found a political subdivision to be an arm of the State under like circumstances.

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[3] The provisions of Title 36, Article 17, cited by the County offer no more support for the County's claims. Grants to counties for "any public purposes," made under Section 36-17-1, are paid not out of the State Public Transportation Fund, but rather from the State's general revenues. *See* Ga. Code Ann. § 36-17-2 ("Office of Treasury and Fiscal Services is authorized and directed to grant such funds to the counties of this state" only "[t]o the extent that funds are made available by the budget authorities pursuant to *the general appropriations Acts*") (emphasis added). The County's factual admission below, *see* J.A. 51a, is therefore dispositive of any claim of immunity premised on such or similar grants.

3. The jurisprudential revolution that would result from endorsing the County's expansive notion of sovereign immunity is apparent from the County's utter failure to articulate any cogent principle that constrains its sweep. The County's proposal to limit application of its delegated state power argument only to delegations of "[u]niquely [c]ore [s]overeign [f]unctions of the State," Resp. Br. at 23, fails completely as a limiting principle, as amply demonstrated by the fact that the maintenance of bridges over navigable waters supposedly so qualifies. If an activity, the state regulation of which is expressly preempted by federal law (*see* 33 C.F.R. § 117.1, note) nevertheless is a "[u]niquely [c]ore" aspect of state sovereignty, it is difficult to imagine what state activities would not be—and the County nowhere suggests a satisfactory answer, or indeed any answer at all.

The likely consequences of affirmance of the decision below are instead aptly foreshadowed by the *amicus* participation of the Southeastern Pennsylvania Transportation Authority ("SEPTA"). SEPTA, which is not an arm of the State under this Court's existing case law, *Bolden v. SEPTA*, 953 F.2d 807, 821 (3d Cir. 1991) (en banc) (Alito, J.), supports the County's position because—like the County—it receives state funding. SEPTA Br. at 2. If this Court were to hold that the mere possibility that the County might use funds previously received from the State to pay a judgment is sufficient to render it an arm of the State, SEPTA and literally thousands of other state-created entities would be transformed into arms of the State immune from suit in federal court simply because they receive some state funding. No principle of sovereign immunity law heretofore recognized by this Court supports such an untoward result.

4. To the extent that the County premises its claim of sovereign immunity in this case on a grant of immunity under Georgia law, *see* Resp. Br. at 18-21, that, too, would be unavailing. It fails first because the Georgia Supreme Court itself has recognized that a political subdivision of the State

enjoys no immunity against claims sounding in maritime law unless it qualifies as "an arm of the state under federal law." *Hines v. Ga. Ports Auth.*, 604 S.E.2d 189, 190 (Ga. 2004). "[S]tate-conferred immunity," the *Hines* court held, "is pre-empted by admiralty law." *Id.* at 191-92 (citing *Workman*, 179 U.S. at 560). Tellingly, *Hines* escapes any mention in the County's long disquisition on Georgia immunity law.

As *Hines* recognized, it has been clear for more than a century that state-law immunity is incapable of limiting the federal courts' jurisdiction to hear admiralty claims. *See Workman*, 179 U.S. at 563 ("the local decisions of one or more States cannot, as a matter of authority, abrogate the maritime law"). Far from a novel proposition of law, even in 1900 *Workman* merely presented as a straightforward application of the well-established principle that state law cannot place *any* limitations on the federal courts' jurisdiction to hear federal claims against a State's political subdivisions. *See Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118, 122 (1869) (holding that an Illinois statute providing that counties could only be sued in state circuit courts could not prevent a federal court from adjudicating a claim against a county); *see also Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893).

In positing that a state-law grant of immunity can limit the scope of federal jurisdiction, the County thus asks this Court to overrule a line of precedent dating at least to Reconstruction. Because the County has failed to proffer even a minimally persuasive rationale for such a radical shift in the balance of power between the federal government and the States, this Court should swiftly reject the County's invitation.

II. THERE IS NO SOUND BASIS FOR IMMUNIZING COUNTIES FROM *IN PERSONAM* ADMIRALTY SUITS.

As a supposedly "narrower" alternative ground for a ruling in its favor, the County suggests that *all* counties are

categorically immune from *in personam* admiralty suits. Resp. Br. at 6, 29. This unsupported—and insupportable—contention is no more convincing than the County's attempt to expand the arm-of-the-state doctrine to include all political subdivisions that exercise any delegated state power.

1. There is simply no legal or historical basis for concluding that, when sued in admiralty, counties enjoy a sovereign immunity defense unavailable in other jurisdictional settings. This Court has never recognized the existence of a distinct sovereign immunity doctrine unique to the admiralty context, but rather has consistently applied the same sovereign immunity standards in federal question and admiralty cases. *See, e.g.*, *FMC*, 535 U.S. at 751 n.6 (endorsing use of the traditional arm-of-the-state test in an admiralty action). Indeed, this Court conclusively resolved this argument against the County in *Workman*, where it rejected the suggestion that a municipality might enjoy some form of sovereign immunity particular to suits in admiralty. *See* 179 U.S. at 565-70.

The County's contention that *Workman* dealt exclusively "with the substantive law of admiralty" and was silent on the question of sovereign immunity (Resp. Br. at 33) is belied by the *Workman* Court's lengthy discussion of the city of New York's amenability to admiralty process and its unambiguous conclusion that "there is not limitation taking [municipal corporations] out of the reach of the process of a court of admiralty." 179 U.S. at 565; *see also id.* at 570 ("the city of New York, *unlike a sovereign*, was subject to the jurisdiction of the court") (emphasis added). Notably, the *Workman* Court explicitly equated sovereign immunity with immunity from admiralty process. *Id.* at 566 ("[W]here maritime torts have been committed by the vessels of a sovereign," admiralty courts have "declined to exercise jurisdiction . . . solely because of the immunity of sovereignty from suit . . . . [T]he doctrine . . . rests . . . on [the admiralty courts'] inability to give redress in a case where jurisdiction over the person or

property cannot be exerted."); *see also* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1565 (2002) ("For members of the Founding generation who believed in sovereign immunity, the concept was relevant to *personal* jurisdiction rather than *subject matter* jurisdiction."). This discussion of the City's susceptibility to admiralty process confirms that the Court addressed not just the substantive law of admiralty, but also its own jurisdiction. *See* United States Br. at 14-20. Simply put, the Court could not have decided *Workman* as it did if municipalities had even an arguable basis for federal-law immunity from suit in admiralty.[4]

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[4] The County places extensive reliance on *Ex parte State of New York, No. 1*, 256 U.S. 490 (1921), in an effort to escape *Workman*'s reach. *Ex parte State of New York*, however, held only that *States* are entitled to sovereign immunity in *in personam* admiralty actions. *Id.* at 500. None of the parties to that case was a political subdivision, and the Court did not even allude to the question of political subdivisions' immunity from suit. *Ex parte State of New York* thus has *absolutely* no bearing on the issue decided in *Workman* and currently before this Court.

The County's attempt (Resp. Br. 35-36) to distinguish *Workman* on the ground that it dealt with a city, rather than a county, is no more convincing. At the time *Workman* was decided, the city of New York—the defendant—was itself comprised of *four* counties. *See* Greater New York Charter, 1897 N.Y. Laws ch. 378. In any event, this Court has never drawn a distinction, for sovereign immunity purposes, between counties and cities; vis-à-vis the federal government, both are nonsovereign municipal corporations. *See Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (a "county . . . is a part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State"); *see also Hess*, 513 U.S. at 47 ("cities and counties do not enjoy Eleventh Amendment immunity"). This is true in Georgia, as elsewhere. *See* Ga. Code Ann. § 36-1-3 ("[e]very county is a body corporate"); *id.* § 36-30-1 ("the words 'city,'

2. Moreover, the common-law authorities on which the County relies—purportedly standing for the proposition that counties could not be held liable at common law for accidents involving bridges—offer little support for its blanket assertion that *all* counties are immune from *in personam* admiralty actions. These common-law decisions did not, as the County suggests, accord immunity to counties on the basis of their status as sovereigns, but instead emphasized counties' status as unfunded corporations. Because counties did not historically maintain their own revenues, members of the corporation—*i.e.*, the residents of the county—would have been jointly and severally liable for a judgment against the county, and the common law refused to impose such an inequitable burden on individuals. *See, e.g., Russell v. The Men of Devon*, 100 Eng. Rep. 359, 362 (K.B. 1788) ("if the county is to be considered as a corporation, there is no corporation fund out of which satisfaction is to be made"); *Riddle v. Proprietors of the Locks & Canals*, 7 Mass. 169, 187-88 (1810) ("[H]aving no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation. This burden the common law will not impose.").[5]

In any event, whatever the King's Bench may have held in the eighteenth century, by 1862, this Court had concluded that municipal corporations were amenable to suit for claims arising from the failure to maintain a bridge. In *Weightman*

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'town,' 'municipality,' or 'village' . . . shall be held to mean a municipal corporation").

[5] The County freely acknowledges that the immunity principle suggested by its English authorities operates "outside the strictures of admiralty jurisdiction." Resp Br. at 32. It is thus difficult to see how this principle is any "narrower" than the County's expansive vision of the arm-of-the-state doctrine.

v. Corporation of Washington, 66 U.S. (1 Black) 39 (1862), the Court concluded that the municipal corporation governing Washington, D.C., was not immune from a federal court action seeking recovery for injuries caused by the collapse of a bridge that the corporation maintained. *Id.* at 53. In so holding, the Court explicitly stated that the corporation's reliance on *The Men of Devon* amounted to "a misapplication of the doctrine there laid down." *Id.* at 52. The Court noted that unlike the instant suit against the municipal corporation, the suit in *The Men of Devon* was effectively "against the inhabitants of a district." *Id.* The *Weightman* Court cited numerous subsequent English cases to establish the "clear and undoubted" proposition that "wherever an indictment would lie [against a municipal corporation] for non-repair, an action on the case would lie at the suit of a party sustaining any peculiar damage." *Id.* at 53. *Weightman* thus makes clear that the Constitution does not immunize counties and other municipal corporations from federal court suits concerning bridge maintenance (or any other subject matter). *See also Nebraska City v. Campbell*, 67 U.S. 590 (2 Black) 590, 592 (1863) ("The law is well settled in respect to public municipal corporations, upon which the duty is imposed to construct and repair, or to keep in repair streets or bridges . . . that they are liable for any special damage arising out of neglect in keeping the same in proper condition."); *Owen v. City of Independence*, 445 U.S. 622, 638-39 (1980) ("[B]y 1871 municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis. In particular, they were routinely sued in both federal and state courts."); United States Br. at 11 n.5.[6]

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[6] The County goes to great lengths to establish that admiralty jurisdiction historically did not extend to events occurring "within the body of a county." Resp. Br. at 30-31. That effort is wasted here, however. Notwithstanding the English rule that disputes arising from conduct that took place within a county's territorial

3. The County's last argument is that the dignity accorded to the States as co-equal sovereigns requires that they be permitted to cloak their political subdivisions in immunity as they see fit. More specifically, the County contends that an essential aspect of the States' sovereignty is the ability to experiment with different modes of delegating state power to political subdivisions, and that a restrictive arm-of-the-state standard interferes with the States' ability to delegate authority and thus trenches on their dignity as co-equal sovereigns. *See* Resp. Br. at 38-40.

One would think that if reversal of the decision below would seriously imperil the dignity of the States as sovereigns, one of those States might have elected to make its voice heard in this case, and it is telling that all instead have chosen to remain silent. Indeed, the County's argument is makeweight. A decision holding that the County is not im-

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jurisdiction were heard in common-law—rather than admiralty—courts, *see, e.g.*, *The King v. Forty-Nine Casks of Brandy*, 166 Eng. Rep. 401, 410 (Adm. 1836) ("'Admiralty causes,' says Blackstone (3 Bl. Com. p. 106), 'must be causes arising wholly upon the sea and not within the precincts of any county'"), the courts of this Nation long ago rejected the historic division of authority between common-law and admiralty courts in favor of the doctrine of navigability. *See United States v. The Schooner Betsey*, 8 U.S. (4 Cranch) 443, 451 (1807); *see also Nelson v. Leland*, 63 U.S. (22 How.) 48, 56 (1860) ("Our contracted views of the English admiralty, which was limited by the ebb and flow of the tide, were discarded, and the more liberal principles of the civil law, equally embraced by the Constitution, were adopted. This law is commercial in its character, and applies to all navigable waters . . . ."). Moreover the County's authorities do not address the central question in this case: whether a county government is entitled to invoke sovereign immunity in an action that is otherwise properly within a federal court's admiralty jurisdiction.

mune from this admiralty suit would in no way curtail the States' discretion to delegate their authority to political subdivisions. States are free—and will remain free after this decision—to structure their political subdivisions as they consider best. *See Holt*, 439 U.S. at 71 (States have "wide latitude . . . in creating various types of political subdivisions and conferring authority upon them").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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February 17, 2006.

Supreme Court, U.S.
FILED
DEC 16 2005
OFFICE OF THE CLERK

No. 04-1618

In the Supreme Court of the United States

NORTHERN INSURANCE COMPANY OF NEW YORK,
PETITIONER

v.

CHATHAM COUNTY, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an entity that does not qualify as an "arm of the State" for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit.

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In the Supreme Court of the United States

No. 04-1618

NORTHERN INSURANCE COMPANY OF NEW YORK,
PETITIONER

v.

CHATHAM COUNTY, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The court of appeals held that a political subdivision that does not qualify as an "arm of the State" for purposes of the Eleventh Amendment nonetheless is entitled to sovereign immunity from an *in personam* suit in admiralty. Pet. App. 3a. Applying that rule, the court concluded that respondent was immune from this action for damages allegedly caused by the county's negligent operation of a drawbridge across the intercoastal waterway. The United States has a significant interest in the immunity question presented by this case.

The United States Coast Guard, through the Office of Bridge Administration, exercises jurisdiction over all bridges spanning the navigable waters of the United

States, including the drawbridge involved in this case. See 33 U.S.C. 401, 491, 499; 33 C.F.R. Pts. 114-117; 33 C.F.R. 117.353(b) (Causton Bluff Bridge). Among other things, the Coast Guard regulates the location and clearance, construction activity, navigation lighting and signals, and operation of bridges. See 34 C.F.R. Pts. 114-117. The Coast Guard's interest in maritime safety is enhanced by the application of basic maritime tort standards to bridges and other facilities built, maintained, and operated by political subdivisions.

The Federal Maritime Commission (FMC) administers the Shipping Act of 1984, 46 U.S.C. App. 1701 *et seq.*, which governs common carriage by water to and from the United States. See 46 C.F.R. 501 *et seq.* The FMC enforces the Shipping Act through prosecutions initiated by it, see 46 U.S.C. App. 1710(a), and through privately-filed complaints adjudicated by FMC, see 46 U.S.C. App. 1710(c). See generally *FMC* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 756-759 (2002). The FMC frequently adjudicates privately-filed complaints against political subdivisions engaged in activities regulated under the Shipping Act, see note 14, *infra*, and therefore has a substantial interest in the amenability of such entities to suit.

The United States also has a general interest in promoting the uniformity of federal maritime law and the flow of commerce on the Nation's navigable waters.

STATEMENT

1. Petitioner is the insurer of a Catalina yacht—*Love of My Life*—owned by James K. Ludwig. On October 6, 2002, Ludwig was sailing *Love of My Life* along the Wilmington River (formerly St. Augustine Creek), a part of the intercoastal waterway, about five

miles south of Savannah, Georgia, near Causton's Bluff.[1] He came upon the Causton Bluff Bridge, a drawbridge owned, operated, and maintained by respondent Chatham County, Georgia. The bridge connects Savannah with Whitemarsh, Wilmington, and Tybee Islands, and was built in 1963 to enable cars to reach the islands. Respondent's employees—"bridge tenders"—operate the bridge mechanism so that the span may be raised to permit passage of light pleasure craft, tug and tow vessels, and other commercial vessels. Pet. App. 7a-8a.

When *Love of My Life* approached the bridge, the bridge tender opened it, but soon realized that the bridge was malfunctioning and that one span was drifting down. Although the tender tried to notify Ludwig of the problem, Ludwig's radio was turned off. The tender was able to stop the downward drift of the span and begin to raise it, but *Love of My Life* nonetheless hit the span and then deviated to the side and struck the bridge itself. As a result of the allision, *Love of My Life* suffered $78,980.50 in damages and Ludwig incurred additional expenses, with the total damages adding up to $137,987.69. Pet. App. 8a-9a.

2. Petitioner commenced this *in personam* admiralty action in United States District Court for the Southern District of Georgia, asserting claims of negli-

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[1] During the Civil War, Causton's Bluff served as a strategic outpost for Savannah and the site of one of the largest earthen work forts occupied by the confederate army. When General Sherman moved on the city in 1864 as part of his march to the sea, the confederate army sent the warship *Isondiga* to guard a former bridge near Causton's Bluff and other key sites. See William N. Still Jr., *Iron Afloat: The Story of the Confederate Armorclads* 215 (1985); see also *Annual Reports of the Navy Department: Report of the Secretary of the Navy* (Report from J.A. Dahlgren to Hon. G. Welles, Jan. 4, 1865).

gence, maintenance of a continuing nuisance, and violation of the navigable servitude encompassed in various U.S. Coast Guard and U.S. Army Corps of Engineers permits. Pet. App. 7a-9a.[2] The district court granted summary judgment for respondent, holding that respondent was entitled to sovereign immunity from suit, and dismissed petitioner's action. *Id.* at 12a-16a.

The district court stated that "[t]he pertinent issue before the Court * * * is whether [respondent] is entitled to the same immunity as the state." Pet. App. 13a. Relying on the decision of the Fifth Circuit in *Broward County* v. *Wickman*, 195 F.2d 614 (1952), the court determined that that issue turned on whether respondent "was acting as part of the State" —*i.e.*, "whether [respondent] was exercising power delegated from the State," or instead "performing a proprietary function." Pet. App. 15a. The court concluded that "counties exercise state power to acquire land and build and operate bridges," *ibid.*, and that respondent "exercis[ed] these state powers" with respect to the bridge at issue. *Id.* at 16a. Accordingly, the court held "that the County is protected by sovereign immunity." *Ibid.*

3. The Eleventh Circuit affirmed. Pet. App. 1a-6a. The court noted that respondent "is not asserting an Eleventh Amendment immunity defense." *Id.* at 3a n.1. It reasoned, however, that "common law has carved out a 'residual immunity,' which would protect a political subdivision such as [respondent] from suit." *Id.* at 3a.

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[2] In an *in personam* admiralty action, "the defendant is a person, not a ship or some other instrument of navigation." *Madruga* v. *Superior Court*, 346 U.S. 556, 560-561 (1954). By contrast, in an *in rem* action, "a vessel or thing is itself treated as the offender and made the defendant by name or description." *Id.* at 560. The question presented in this case is limited to *in personam* admiralty actions.

In reaching that conclusion, the court of appeals relied on the Fifth Circuit's decision in *Wickman*, which held that a county was entitled to immunity from suit for the alleged negligent operation of a bridge. *Id.* at 4a.

The court of appeals also referred to this Court's decisions in *Workman* v. *New York City*, 179 U.S. 552 (1900), and *Ex parte New York*, 256 U.S. 490 (1921). In *Workman*, this Court held that New York City could be held liable in an *in personam* admiralty suit arising from a collision between one of its fireboats and a private vessel, whereas in *Ex parte New York* the Court held that New York State was entitled to sovereign immunity from a similar suit. The court of appeals reasoned that this case was "parallel" to *Ex parte New York*, not to *Workman*, because respondent—though not a State—exercised powers delegated from the State in operating the bridge. Pet. App. 4a-5a. Accordingly, the court held that respondent was entitled to "invoke residual sovereign immunity" to defeat this action. *Id.* at 5a.

SUMMARY OF ARGUMENT

A political subdivision that does not enjoy Eleventh Amendment immunity under the arm-of-the-state doctrine is not entitled to assert sovereign immunity from an *in personam* admiralty action.

A. The Eleventh Amendment and the basic constitutional principles it embodies guarantee an immunity from suit for States and entities that are considered "arms of the State." In *Ex parte New York*, 256 U.S. 490, 500 (1921), this Court held that state sovereign immunity extends to *in personam* admiralty suits. In a long line of cases before and after that time, however, the Court has established in non-admiralty cases that this "principle of sovereign immunity * * * does not ex-

tend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden* v. *Maine*, 527 U.S. 706, 756 (1999). Accordingly, it is settled that political subdivisions of States and other entities that are not arms of the State are not entitled to sovereign immunity under the Constitution.

B. In *Workman* v. *New York City*, 179 U.S. 552 (1900), this Court refused to adopt a different regime for admiralty. The Court held that the immunity of political subdivisions is governed by uniform federal admiralty law, not by the widely varying laws and rules of the States or their political subdivisions. In addition, the Court held that there is no basis in admiralty law for recognizing immunity of political subdivisions of States from *in personam* suits in admiralty. Nothing in *Ex parte New York* undermines either of those holdings. *Ex parte New York* expressly cited *Workman*, and it distinguished *Workman* on precisely the ground that *Workman* dealt with lesser political entities that, unlike States, are not entitled to immunity and that therefore are within the reach of the admiralty courts.

C. The *Workman* rule has stood the test of time and dovetails with settled immunity principles recognized outside of admiralty. In addition, the rule is supported by important objectives of admiralty law—*i.e.*, compensating the victims of wrong and establishing uniform rules governing ships as they pass from port to port. The court of appeals' rule that political subdivisions enjoy immunity whenever they exercise powers delegated from the State would foster uncertainty, and thus litigation, about the threshold jurisdictional determination when such entities are subject to suit. Moreover, in a broad sense, all powers exercised by such subdivisions

are drawn from the State, and it would therefore be exceptionally difficult to apply the court of appeals' immunity test in any principled fashion.

D. A rule that political subdivisions are immune from *in personam* admiralty actions would disrupt significant federal interests. First, immunizing such activities from basic admiralty tort principles would undermine an important incentive to operate bridges and other maritime facilities safely, and it would therefore disserve the significant federal interest in maritime safety. Second, the court of appeals' immunity rule could frustrate the objectives of the Shipping Act by inviting challenges to the jurisdiction of the FMC to adjudicate private complaints filed against local government entities under the Shipping Act. Cf. *FMC* v. *South Carolina State Ports Auth.*, 535 U.S. 743 (2002). Third, holding that political subdivisions are immune from *in personam* admiralty suits could impede maritime commerce by threatening the confidence that vessel owners have in the safety of bridges and other maritime facilities as their vessels move from one port to the next along the Nation's vital network of navigable waters.

ARGUMENT

A POLITICAL SUBDIVISION THAT IS NOT AN "ARM OF THE STATE" UNDER THE ELEVENTH AMENDMENT MAY NOT INVOKE SOVEREIGN IMMUNITY AS A DEFENSE TO AN *IN PERSONAM* SUIT IN ADMIRALTY

The Constitution "extend[s]" the judicial power of the United States "to all Cases * * * of admiralty and maritime Jurisdiction," U.S. Const. Art. III, § 2, Cl. 1. The "fundamental purpose" underlying that jurisdictional grant is "[t]o preserve adequate harmony and appropriate uniform rules relating to maritime matters

and bring them within control of the Federal Government." *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 160 (1920); see Joseph Story, *Commentaries on the Constitution* § 870, at 618-619 (abridged ed. 1833) (1987 reprint). The establishment of a uniform body of federal law governing maritime matters was of particular concern to the framers, because "[m]aritime commerce was . . . the jugular vein of the Thirteen States." *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 501 (1998) (quoting Frankfurter & Landis, *The Business of the Supreme Court* 7 (1927)); see also David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158, 163.[3] The decision below extending sovereign immunity to a political subdivision that is not an "arm of the State" for purposes of the Eleventh Amendment is wrong and threatens the long-standing federal interest in uniformity by placing such entities beyond the reach of admiralty courts.

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[3] Federal jurisdiction over admiralty actions is not exclusive. Since the first Judiciary Act in 1789, state courts have had concurrent jurisdiction over *in personam* admiralty actions under the "saving to suitors" clause now embodied in 28 U.S.C. 1333(1). See *American Dredging Co.* v. *Miller*, 510 U.S. 443, 446 (1994). In entertaining such actions, however, state courts are generally obliged to give effect to the substantive rules of federal maritime law. *Id.* at 447. A state court may not adopt a remedy that "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law." *Ibid.* (quoting *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 216 (1917)).

A. Only A State Or An "Arm Of The State" May Assert Sovereign Immunity Under The Constitution

1. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." In *Hans* v. *Louisiana*, 134 U.S. 1 (1890), the Court held that the constitutional principles reflected in the Eleventh Amendment extend to suits against a State by its own citizens, even though such suits do not fall within the Amendment's plain terms. In later cases, the Court has held that those same basic principles preclude suits against States in a number of other contexts not explicitly addressed by the text of the Eleventh Amendment. See, *e.g.*, *FMC* v. *South Carolina State Ports Auth.*, *supra* (administrative adjudications before FMC); *Alden* v. *Maine*, 527 U.S. 706 (1999) (private suits in state courts pursuant to federal causes of action); *Blatchford* v. *Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775 (1991) (suits by Indian tribes); *Principality of Monaco* v. *Mississippi*, 292 U.S. 313 (1934) (suits by foreign nations); *Smith* v. *Reeves*, 178 U.S. 436 (1900) (suits by federal corporations).

2. It is established that state sovereign immunity provides the States with "a defense to suits in admiralty, though the text of the Eleventh Amendment addresses only suits 'in law or equity.'" *Alden*, 527 U.S. at 728 (citing *Ex parte New York*, 256 U.S. 490, 497 (1921)). In *Ex parte New York*, certain barge owners sued tugboat owners in admiralty for damages to barges in tow. The district court ordered the state superintendent of public works to appear in his official capacity and answer the

claims, because the tugs were under charter to the State when they suffered the damages. *Id.* at 496, 501. The case tested the ability of the State itself to assert sovereign immunity in admiralty court; no political subdivision was involved in the case. Citing *Hans* and other cases, this Court noted that "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given." *Id.* at 497. The Court added: "[n]or is the admiralty and maritime jurisdiction exempt from the operation of this rule." *Ibid.* See *id.* at 503 (The States, which are "exempt from litigation at the suit of individuals in *all other judicial tribunals*," are entitled to "a like exemption in the courts of admiralty and maritime jurisdiction.") (emphasis added). In short, the Court held that "the immunity of a State from suit *in personam* in the admiralty brought by a private person without its consent, is clear." *Id.* at 500.[4]

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[4] *Ex parte New York* has frequently been cited for the proposition that the principles of Eleventh Amendment sovereign immunity apply to *in personam* admiralty cases. See, *e.g.*, *FMC*, 535 U.S. at 754; *Deep Sea Research*, 523 U.S. at 503; *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 n.4 (1993); *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 473, 488-489 (1987) (plurality opinion); *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974); *Land* v. *Dollar*, 330 U.S. 731, 738 (1947). By contrast, the "Court has not always charted a clear path in explaining the interaction between the Eleventh Amendment and the federal courts' *in rem* admiralty jurisdiction." *Deep Sea Research*, 523 U.S. at 502. In the *in rem* context, the Court has held that the Eleventh Amendment does *not* bar admiralty jurisdiction in a case against a State where the State is not in possession of the vessel or property at issue, but has indicated that the Eleventh Amendment *does* bar the exercise of such jurisdiction when the vessel or property at issue is in the hands of the State. *Id.* at 507;

3. An "important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities," and that such immunity therefore "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden* v. *Maine*, 527 U.S. at 756; see *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 369 (2001) ("[T]he Eleventh Amendment does not extend its immunity to units of local government"). The "ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates." *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994). But this Court has recognized at least since *Lincoln County* v. *Luning*, 133 U.S. 529, 530 (1890)—which was decided the same day as *Hans* v. *Louisiana*—that "cities and counties do not enjoy Eleventh Amendment immunity." *Hess*, 513 U.S. at 47.[5] Because "[t]he bar of the Eleventh Amendment to suit in federal court * * * does not extend to coun-

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see *The Davis*, 77 U.S. (10 Wall.) 15 (1869). Because this case is an *in personam* admiralty action, the scope of sovereign immunity with respect to *in rem* admiralty actions is not at issue.

[5] This understanding is deeply rooted in our history. Municipalities typically were subject to suit in tort from the founding. *Owen* v. *City of Independence*, 445 U.S. 622, 638-650 (1980). By 1871, "[a]s a general rule, it was understood that a municipality's tort liability in damages was identical to that of private corporations and individuals." *Id.* at 640; see *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 126-127 (2003); *Monell* v. *Department of Soc. Servs. of the City of New York*, 436 U.S. 658, 687-688 (1978); see also *Detroit* v. *Osborne*, 135 U.S. 492, 498 (1890); *Barnes* v. *District of Columbia*, 91 U.S. 540 (1875); *Evanston* v. *Gunn*, 99 U.S. 660 (1878); *Nebraska City* v. *Campbell*, 67 U.S. (2 Black) 590, 590 (1863); *City of Chicago* v. *Robbins*, 67 U.S. (2 Black) 418, 428 (1863); *Weightman* v. *Corporation of Wash.*, 66 U.S. (1 Black) 39, 50 (1862).

ties and similar municipal corporations," subordinate political entities that are not sufficiently identified with the State itself to be considered arms of the State are "not entitled to assert any Eleventh Amendment immunity from suit in the federal courts." *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280-281 (1977).[6]

The fact—deemed dispositive by the court of appeals in this case—that an entity, though not an arm of the State, may be exercising powers delegated by the State is of no consequence in applying the rule that political subdivisions are not entitled under the Constitution to state sovereign immunity. Thus, "the Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a slice of state power." *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) (internal quotation marks omitted).

Indeed, even in the context of determining whether an entity is an arm of the State (which is *not* an issue

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[6] That bedrock rule finds expression throughout this Court's case law. See also, *e.g.*, *Jinks* v. *Richland County*, 538 U.S. 456, 465-466 (2003) ("Although we have held that Congress lacks authority under Article I to override a *State's* immunity from suit in its own courts, it may subject a *municipality* to suit in state court if that is done pursuant to a valid exercise of its enumerated powers.") (citation omitted); *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 n.10 (2001) ("Only States and state officers acting in their official capacity are immune from suits for damages in federal court. Plaintiffs may bring suit for damages against all others, including municipalities and other political subdivisions of a State.") (citation omitted); cf. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978) (state action antitrust exemption does not extend to political subdivisions).

here), the Court has not focused on the extent to which it exercises delegated state powers. For example, in *Auer* v. *Robbins*, 519 U.S. 452, 456 n.1 (1997), the Court rejected the claim that the St. Louis, Missouri, Board of Police Commissioners was an arm of the State. In reaching that conclusion, the Court did not inquire into whether or to what extent the Board exercised powers delegated by the State. Instead, the Court noted that, although the state governor appointed four of the five board members, the city was "responsible for the board's financial liabilities" and "the board is not subject to the State's direction or control in any other respect." *Ibid.* (citation omitted). See *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 (1997) (inquiry focuses on "the essential nature and effect of the proceeding" and the "nature of the entity created by state law") (internal quotation marks and citations omitted); *Mt. Healthy*, 429 U.S. at 280 (inquiry "depends, at least in part, upon the nature of the entity created by state law" and basing inquiry on extent of independent powers of entity to raise money and issue bonds). The "arm of the State" inquiry necessarily turns on the nature of the entity and extent of state control, rather than the extent to which an entity exercises powers delegated by the State, at least in part because all local governments exercise powers that, in theory, could be exercised by the State itself and are therefore delegated. See pp.21-22, *infra*.

The same principle—that States generally are entitled under the Constitution to sovereign immunity and political subdivisions are not—has been applied in admiralty contexts. Indeed, in the same Term that the Court held in *Ex parte New York* that constitutional principles of state sovereign immunity shield States from *in personam* liability in admiralty, the Court stated in an-

other admiralty case that "[t]he Port [of Seattle], being a municipal corporation under the laws of Washington * * * could have been sued in the federal court." *Port of Seattle* v. *Oregon & Washington R.R.*, 255 U.S. 56, 71 (1921) (citing, *inter alia*, *Lincoln County* v. *Luning*, *supra*). The Court explained that "although the State has also an interest" in the case, "suit against the [municipal] port would not be prevented by the Eleventh Amendment." *Ibid.*

Accordingly, basic principles of sovereign immunity protected by the Constitution compel the conclusion that, although the States and their arms enjoy immunity from *in personam* suits in admiralty, that "immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden*, 527 U.S. at 756.

B. In *Workman* v. *City of New York*, This Court Held That Municipalities Do Not Enjoy Any Specialized Form Of Immunity From *In Personam* Suits In Admiralty

1. a. More than a century ago, in *Workman* v. *New York City*, 179 U.S. 552 (1900), this Court held that admiralty law recognizes no extra-constitutional principle of immunity for political subdivisions. In *Workman*, a fire-boat owned by the City of New York collided with another vessel in attempting to extinguish a fire in a warehouse. Applying state law, the court of appeals held that, because "the city, in the operation of the fire-boat, performed a governmental, and not a corporate, function," the city was not liable in admiralty for its actions. See *id.* at 557. In the view of the court of appeals, actions taken "for the general good of the public as individual citizens * * * are governmental" (and hence within the realm of immunity), while actions that "pri-

marily and legitimately devolve upon the municipality itself" are not governmental (and hence may be the subject of suit). *Id.* at 556.

This Court reversed. The Court explained that the case presented two questions: "first, whether * * * the law of the city of New York or the maritime law should control; and, second, if the case is solely governed by the maritime law, whether the city of New York is liable." 179 U.S. at 557. With respect to the first question, the Court explained that, if state law were permitted to control, maritime law "would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port;" and "one thing to-day and another thing to-morrow." *Id.* at 558; see *id.* at 559-563. Because that would lead to "[t]he practical destruction of a uniform maritime law," *id.* at 558, the Court held that the question whether the city could be held liable was governed by uniform federal admiralty law, not by state law. Cf. *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447, 450-454 (1994).[7]

The Court then turned to the question whether, "under maritime law, the city of New York was liable for the injury inflicted by the fire-boat." 179 U.S. at 563-564. The Court explained that "there is no limitation

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[7] As the *Workman* Court recognized, the English courts had reached the same conclusion:

> "It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not."

179 U.S. at 560 (quoting *Mersey Docks & Harbour Bd., Tr.* v. *Gibbs*, (1866) L.R. 1 H.L. 122).

taking [municipal] corporations out of the reach of the process of a court of admiralty." *Id.* at 565. To the contrary, such political subdivisions "are amenable to judicial process" and "admiralty * * * courts, within the limit of their jurisdiction, may reach persons having a general capacity to stand in judgment." *Ibid.* Having found that the city "was * * * subject to the process of a court of admiralty," *id.* at 566, the Court held that "in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty," *id.* at 570. The Court therefore concluded that the city's immunity defense "was without foundation in the maritime law." *Ibid.*

Even the dissenters in *Workman* did not advance a theory of general municipal liability from *in personam* suits in admiralty comparable to the one adopted by the court of appeals below. Rather, they took the much narrower position that a city should not be subjected to tort liability for firefighting and similar emergency activities. See 179 U.S. at 577-581. They distinguished cases, more analogous to this one, allowing suits against a municipality "for injuries from a defect in a highway which the city is bound by its charter to repair," *id.* at 575, or for cases involving "injuries caused to vessels by not keeping open a draw in a bridge," *id.* at 589.[8]

b. The holding of *Workman* that "*the theory of sovereign attribute* * * * does not control the maritime law,

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[8] Drawbridge accidents were not uncommon by the time of *Workman*, and admiralty courts had recognized the *in personam* liability of municipalities for negligence in the operation of drawbridges. See, *e.g.*, *Greenwood* v. *Town of Westport*, 60 F. 560 (D. Conn. 1894); *Hill* v. *Board of Chosen Freeholders of Essex County*, 45 F. 260 (D. N.J. 1891); *City of Boston* v. *Crowley*, 38 F. 202 (D. Mass. 1889).

and cannot justify an admiralty court in refusing to redress a wrong where it has jurisdiction to do so," 179 U.S. at 572, has been recognized by the lower courts from the time that *Workman* was decided.[9] Likewise, the treatise writers uniformly acknowledge that holding. As the 1940 edition of *Benedict on Admiralty* explained, "[a] municipal corporation, unlike a sovereign, is subject to the jurisdiction of a court of admiralty and neither the public nature of the service upon which a municipal vessel is engaged at the time of the commission of a maritime tort nor a local rule of law rendering the city nonliable in the State courts on the theory that the city was exercising not merely a corporate but a governmental

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[9] See, *e.g.*, *City of Chicago* v. *White Transp. Co.*, 243 F. 358, 359 (7th Cir.) ("[A] municipal corporation is liable for any negligent act, committed on navigable waters, which would render any private corporation or any individual liable"), cert. denied, 245 U.S. 660 (1917); *Maryland* v. *Miller*, 194 F. 775, 784 (4th Cir. 1911) (holding city liable for maritime tort and stating that "even the nonliability of a city by reason of the exercise of its governmental functions does not serve to relieve it from liability"); *Connone* v. *Transport Desgagnes, Inc.*, 976 F. Supp. 1111, 1112 (N.D. Ohio 1997) ("[U]nder federal maritime law, it is well established that a political subdivision of a state may not invoke sovereign immunity as a defense against maritime tort claims.") (citing cases); *Principe Compania Naviera, S.A.* v. *Board of Comm'rs*, 333 F. Supp. 353, 356 & n.10 (E.D. La. 1971) ("[W]here an admiralty court has jurisdiction over the parties and subject matter, sovereign immunity will not defeat an otherwise meritorious lawsuit brought against a state agency for its alleged torts"); *Kelley Island Lime & Transp. Co.* v. *City of Cleveland*, 47 F. Supp. 533, 540 (N.D. Ohio 1942) ("The liability of a municipality for a maritime tort * * * has been established in the courts for several decades."); *O'Keefe* v. *Staples Coal Co.*, 201 F. 131, 134 (D. Mass. 1910) (holding county subject to maritime liability for negligent operation of drawbridge and relying on *Workman* for the proposition that "because the city was amenable to the process of the admiralty court, * * * it was liable like any other defendant for a maritime tort").

function can bar a recovery in admiralty." 1 Erastus C. Benedict, *The Law of American Admiralty* § 216, at 481-482 (6th ed. 1940). Accord Grant Gilmore & Charles L. Black, *The Law of Admiralty* § 9-13, at 608 (2d ed. 1975) (*Workman* "held that the city could be sued *in personam*, under principles of maritime law which prevailed over local law by which the city was immune from suit"); 1 Steven F. Friedell, *Benedict on Admiralty* § 112, at 7-37 (7th ed. (revised) 1988) ("Nor can a state law deprive a party of redress in admiralty against a municipality for the negligence of its servants.").

In addition, this Court has considered several admiralty cases against political subdivisions since *Workman*, with no inkling that such entities are entitled to sovereign immunity. See, *e.g.*, *City of Milwaukee* v. *Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189 (1995); *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995); *Morales* v. *City of Galveston*, 370 U.S. 165 (1962); *Jacob* v. *New York City*, 315 U.S. 752 (1942). And lower courts (outside the Fifth Circuit and the Eleventh Circuit here) have generally followed *Workman* and rejected claims by municipalities of immunity (whether based on federal or state law) in admiralty actions. See, *e.g.*, *Complaint of Great Lakes Dredge & Dock Co.*, No. 92 C 6754, 1996 WL 210081, at *2 (N.D. Ill. Apr. 26, 1996) (collecting cases).[10]

c. The Court in *Workman* acknowledged that, where a foreign sovereign itself or a vessel owned by a foreign

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[10] See also *Rodgers & Hagerty, Inc.* v. *City of New York*, 285 F. 362, 363-364 (2d Cir. 1922), cert. denied, 261 U.S. 621 (1923); *City of Chicago* v. *White Transp. Co.*, 243 F. at 358-359; *The Thielbek*, 241 F. 209, 214 (9th Cir.), cert. denied, 245 U.S. 661 (1917); *Pelican Marine Carriers, Inc.* v. *City of Tampa*, 791 F.Supp. 845, 856-858 (M.D. Fla. 1992), aff'd, 4 F.3d 999 (11th Cir. 1993) (Table).

sovereign had been sued in an admiralty court, the court had "declined to exercise jurisdiction." 179 U.S. at 566; see *id.* at 567-569 (citing English cases). The Court explained that "these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted." *Id.* at 566. They "rest[], not upon the supposed want of power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted." *Ibid.* Where, as in the case of political subdivisions, the admiralty court does have jurisdiction, "the maritime law affords no justification" for the contention that the subdivision in its "public or governmental" capacity "should be treated by the maritime law as a sovereign" and excused from liability. *Id.* at 566.

2. As noted above, twenty years after *Workman*, this Court held in *Ex parte New York* that States are entitled under the Constitution to sovereign immunity from *in personam* admiralty suits. That result, however, is entirely consistent with *Workman*. The *Ex parte New York* Court explained that *Workman* "was careful to distinguish between the immunity from jurisdiction attributable to a sovereign upon grounds of policy, and immunity from liability in a particular case." 256 U.S. at 499. The Court held that States were entitled to "immunity from jurisdiction" in admiralty (as in other) cases. See *id.* at 497 (noting that a State under the Constitution "may not be sued without its consent"). Neither the holding nor the rationale of *Ex parte New York*, however, did anything to disturb *Workman*'s holding that admiralty law does not recognize—for entities that *are* subject to the jurisdiction of an admiralty

court—an "immunity from liability in a particular case." The *Workman* and *Ex parte New York* decisions therefore complement one another and track the general rule outside of admiralty: while States (and arms of States) are entitled to sovereign immunity, lesser political entities are not.

3. The court of appeals in this case failed to recognize the crucial difference between the State, which is entitled under the settled principles discussed above to sovereign immunity, and its political subdivisions, which are not. The court of appeals noted that its predecessor court in *Broward County* v. *Wickman*, 195 F.2d 614 (5th Cir. 1952), had, instead of following *Workman*, "dr[awn] a parallel to" *Ex parte New York*. No such parallel, however, would be valid. *Ex parte New York* stands for the proposition that, absent consent, a *State* has immunity from an *in personam* suit in admiralty. Nothing in *Ex parte New York* suggests that the immunity it recognized would extend beyond the State or an arm of the State, and *Ex parte New York* has never been cited for that principle by this Court. The court of appeals therefore was mistaken in holding that the correct "parallel" (Pet. App. 4a) in a case involving a political subdivision is to *Ex parte New York*, rather than to this Court's decision squarely rejecting immunity for such political subdivisions in *Workman*.[11]

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[11] The court of appeals' error in fact dates back to the Fifth Circuit's decision in *Broward County* v. *Wickman*, *supra*. In that case, a yacht owner sued a Florida county for damages incurred when it struck an abutment of a drawbridge. The court noted that a Florida Supreme Court decision had held that a Florida county "partakes of the immunity of the state, and may not be sued at law in an action *ex delicto* by one who has sustained damage because the county permitted a bridge to become unsafe." 195 F.2d at 615. The Florida Supreme

Furthermore, the court of appeals' alternative rule grounding immunity on whether a municipality is "exercising power delegated from the state," Pet. App. 5a, is not only directly at odds with the reasoning of *Workman*, see 179 U.S. at 570 (rejecting immunity rule based on "public nature of the service" in which municipality was engaged), but also would lead to indeterminate and arbitrary results. To begin with, because *all* power exercised by political subdivisions is in a broad sense "a slice of state power," *Lake Country Estates*, 440 U.S. at 401; see *Lincoln County* v. *Luning*, 133 U.S. at 530 (a political subdivision necessarily exercises only "such powers as are given to it by the state"), the court of appeals' test may not be capable of meaningful application.

Moreover, to the extent that the test is able to draw meaningful distinctions among maritime activities engaged in by municipalities, it reduces the threshold jurisdictional inquiry as to whether a municipal defendant is amenable to suit to a case-by-case determination of what powers allegedly were exercised by the municipality with respect to the particular events giving rise to suit. Unlike the "arm of the State" inquiry, which focuses on the nature of the entity and therefore will not vary from case to case (see pp. 12-13, *supra*), this inquiry would focus on the specific activities involved in a

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Court's holding, however, should have been of no consequence, because this Court's decision in *Workman* expressly rejected the proposition that the immunity of a political subdivision in an admiralty case depends on state law, and that basic rule of admiralty law is equally binding in state court. See note 3, *supra*. The court of appeals in *Wickman* was accordingly mistaken in concluding that "a state *and its political subdivisions* are immune from process in actions of this character." *Ibid.* (emphasis added).

given case, and would have to be relitigated anew in each case. The inquiry, though presumably resolving an issue of federal law, would not only be fact-specific, but would turn largely on questions of state law (including a comparative analysis of which maritime functions are typically delegated to local entities). Such a case-by-case inquiry could only foster uncertainty, and the litigation that accompanies uncertainty, about when municipalities are answerable in admiralty court. See *Grupo Dataflux* v. *Atlas Global Group, LP*, 124 S. Ct. 1920, 1930 (2004) ("[u]ncertainty regarding the question of jurisdiction is particularly undesirable"); *Great Lakes Dredge & Dock Co.*, 513 U.S. at 547 (jurisdictional rules should not depend on case-specific inquiries that "would be hard to apply, jettison[] relative predictability for the open-ended rough-and-tumble of factors," and invit[e] complex argument in a trial court and a virtually inevitable appeal.").[12]

C. The *Workman* Rule Complements This Court's Sovereign Immunity Precedents And Promotes Important Interests Of Admiralty Law

There have been no developments in the law that have undercut *Workman*'s "doctrinal underpinnings." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). To the contrary, the holding in *Workman* that political subdivisions do not partake of the State's sovereign immu-

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[12] Another problem with the court of appeals' rule is that States at times delegate functions not merely to political subdivisions but to private actors as well. See, *e.g.*, *Richardson* v. *McKnight*, 521 U.S. 399 (1997) (prisons); *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213 (1867) (private bridge over navigable water). The court of appeals' rule could lead to claims of immunity by such private actors, a result that is at odds with traditional principles of sovereign immunity.

nity dovetails with settled immunity principles repeatedly recognized by this Court outside of admiralty. See *Alden* v. *Maine*, 527 U.S. at 756; Part A, *supra*. Furthermore, the settled distinction that the constitutional framework and this Court's decisions draw between the States and their political subdivisions for purposes of sovereign immunity preserves the State's sovereign immunity for any functions that a State determines to perform itself, while at the same time precluding States from leveraging their immunity to shield other entities from suit. The distinction therefore has been consistently and recently recognized and reaffirmed by the Court. See pp. 11-13, *supra*.

Moreover, recognizing a new municipal immunity from admiralty suits at this late date not only would require overruling *Workman* and sharply deviating from the established framework for sovereign immunity, but would be inconsistent with central principles of admiralty law. An important objective of admiralty law has long been to compensate the victims of wrong, and the Court in *Workman* relied in part on that objective to support its result. See *Workman*, 179 U.S. at 563 (noting "imperative command" of admiralty courts to "administer redress for every maritime wrong in every case where they have jurisdictional power over the person by whom the wrong has been committed"); see also *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 386-387 n.5 (1970) (permitting wrongful death recoveries under general maritime law); *The Max Morris*, 137 U.S. 1, 14 (1890) (rejecting contributory negligence as absolute bar to recovery in admiralty cases); *The Sea Gull*, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12, 578) (Chase, J.) ("[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give

than to withhold the remedy."). Holding that municipalities are immune from *in personam* suits in admiralty would bar recovery to the victims of maritime torts involving the operation of bridges, the maintenance of ports, piers, or wharves, and a host of other maritime activities engaged in by municipalities.

Another fundamental objective of admiralty law is uniformity. See *Great Lakes Dredge & Dock Co.*, 513 U.S. at 546 n.6 (one of the justifications for admiralty jurisdiction is promoting "uniformity of substantive law"); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874) ("One thing * * * is unquestionable; the Constitution must have referred to a system of [admiralty] law coextensive with, and operating uniformly in, the whole country."); Frankfurter & Landis, *supra*, at 7 ("The need for a body of [admiralty] law applicable throughout the nation was recognized by every shade of opinion in the constitutional convention."). Adopting a legal regime that permitted a vessel's right of redress for injuries to vary from one port to the next would threaten that important interest. This Court in *Workman* recognized the haphazard and potentially disruptive legal regime that would exist if a vessel's ability to recover for injuries "instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow" as the vessel traveled from port to port. 179 U.S. at 558. In *Workman*, this Court spared maritime law from such a haphazard and potentially disruptive legal regime by following the general rule that municipalities are not immune from suit. There is no reason for the Court to reverse course here.

D. Holding That Political Subdivisions Are Entitled To Immunity From *In Personam* Suits In Admiralty Could Disrupt Important Federal Interests

In several different respects, a rule that political subdivisions are immune from *in personam* admiralty actions could disrupt significant federal interests.

1. Nationwide there are thousands of bridges over navigable waters. Pursuant to Act of Congress (see 33 U.S.C. 401, 491), the U.S. Coast Guard exercises jurisdiction over all such bridges, including their location and clearance, construction, lighting and safety, and maintenance, and the use and operation of drawbridges in particular. See 33 C.F.R. Pts. 114-118. The existing federal regulatory regime, however, rests in part on the understanding based on *Workman* and its acceptance for more than a century that political subdivisions remain subject to the incentives for safe operation provided by admiralty tort principles. If such entities, contrary to the longstanding background principle, could assert immunity from *in personam* suits for maritime torts, that would unsettle the baseline for federal regulation and could require more intensive federal regulation of bridges and the imposition of additional expenses on both the federal government in terms of dollars and on local governments in terms of lost autonomy.

2. A holding that political subdivisions enjoy immunity from suit in admiralty also could invite challenges to the jurisdiction of the FMC to adjudicate privately filed complaints against such entities. Pursuant to the Shipping Act, the FMC regulates, *inter alia*, entities—called marine terminal operators, or MTOs—engaged "in the business of furnishing wharfage, warehouse, or other terminal facilities in connection with a common carrier." 46 U.S.C. App. 1702(14). The

FMC relies on privately filed complaints, among other enforcement tools at its disposal, to ensure that MTOs comply with the Shipping Act.[13]

MTOs are frequently operated by state or local government entities. In particular, there are at least 126 commercial ports in the United States that are affiliated with a state or local government instrumentality. See American Ass'n of Port Authorities, *Seaport Governance in the United States and Canada* (*available at* <http://www.aapa-ports.org/pdf/governance_uscan.PDF>). The FMC estimates that a significant percentage of such ports (as high as 70%) are operated by municipal or county authorities. And the FMC frequently adjudicates privately filed complaints against such authorities, including complaints alleging unreasonable discrimination by MTOs in awarding of terminal leases for facilities built and maintained by public entities.[14]

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[13] The FMC's regulation of MTOs includes the oversight of filed agreements, which involve the fixing or discussing of rates and which are immune from antitrust prosecution, see 46 U.S.C. App. 1703(b); the oversight of the publication of rates, regulations, and practices, see 46 U.S.C. App. 1707(f); and oversight of regulated conduct to ensure that MTOs do not engage in prohibited acts, including prohibitions against unreasonable preferences, unreasonable discrimination, and unreasonable refusals to deal or negotiate, see 46 U.S.C. App. 1709(d).

[14] See, *e.g.*, *New Orleans Stevedoring Co.* v. *Board of Comm'rs*, 29 Shipping Reg. (P&F) 1066 (FMC June 28, 2002), aff'd, 80 Fed.Appx. 681 (D.C. Cir. 2003); *NPR, Inc.* v. *Board of Comm'rs*, 28 Shipping Reg. (P&F) 1512 (FMC Mar. 16, 2000); *Ryan-Walsh, Inc.* v. *Port of Houston Auth.*, 28 Shipping Reg. (P&F) 236 (FMC Mar. 30, 1998); *Southern Pac. Transp. Co.* v. *Port of Long Beach*, 27 Shipping Reg. (P&F) 690 (FMC Sept. 5, 1996); *James J. Flanagan Shipping Corp.* v. *Lake Charles Harbor & Terminal Dist.*, 27 Shipping Reg. (P&F) 923 (FMC July 30, 1997); *Seacon Terminals, Inc.* v. *The Port of Seattle*, 26 Shipping Reg. (P&F) 886 (FMC Apr. 14, 1993); *Independent Pier Co.* v. *Philadelphia Reg'l Port Auth.*, 25 Shipping Reg. (P&F) 1381 (FMC Feb. 20, 1991);

In *FMC* v. *South Carolina State Ports Authority*, this Court held that Eleventh Amendment sovereign immunity extends to an FMC adjudication in a privately filed complaint against an entity that is an "arm of the State." See 535 U.S. at 751 & n.6. The rule adopted by the court of appeals in this case could interfere with the FMC's regulatory duties if political subdivisions that did not qualify as "arms of the State" claimed immunity from the FMC's adjudicatory jurisdiction on the ground that political subdivisions, like the State itself in *South Carolina State Ports Authority*, are entitled to sovereign immunity in admiralty.

3. Finally, a rule that political subdivisions may be immune from suit in an *in personam* admiralty action could impact the flow of commerce along the Nation's navigable waters. As this Court observed in *Workman*, "[i]t cannot be doubted that the greater part, if not the whole, of the maritime commerce of the country is either initiated or terminated in ports where municipal corporations exist." 179 U.S. at 559. Granting immunity from admiralty suit to political subdivisions that construct, operate, or maintain ports, bridges, and other maritime

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Gulf Container Line, BV v. *Port of Houston Auth.*, 25 Shipping Reg. (P&F) 1454 (FMC May 3, 1991); *Chilean Nitrate Sales Corp.* v. *Port of San Diego*, 24 Shipping Reg. (P&F) 920 (FMC Apr. 29, 1988); *New Orleans S.S. Ass'n* v. *Plaquemines Port, Harbor & Terminal Dist.*, 28 F.M.C. 556 (1986), aff'd *sub nom. Plaquemines Port, Harbor & Terminal Dist.* v. *Federal Mar. Comm'n*, 838 F.2d 536, 539 (D.C. Cir. 1988); *Wilmington Stevedores, Inc.* v. *The Port of Wilmington*, 28 F.M.C. 24 (1985); *Transportacion Maritima Mexicana, S.A.* v. *Board of Comm'rs*, 25 F.M.C. 698 (1983); *Louis Dreyfus Corp.* v. *Plaquemines Port, Harbor & Terminal Dist.*, 25 F.M.C. 59 (1982); *Jacksonville Mar. Ass'n* v. *City of Jacksonville*, 27 F.M.C. 149 (1984); *West Gulf Mar. Ass'n* v. *City of Galveston*, 22 F.M.C. 101 (1980); *West Gulf Mar. Ass'n* v. *Port of Houston Auth.*, 22 F.M.C. 420 (1980).

facilities could lessen the confidence that vessel owners have in their ability to send their vessels and goods safely from one port to another, throughout the Nation. It is therefore important that the uniform body of maritime law—which was designed at least in part to promote the flow of maritime commerce, see *Great Lakes Dredge & Dock Co.*, 513 U.S. at 546 n.6—apply fully to municipalities and other subdivisions, as it does to other entities.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2005

FILED
FEB 3 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(5)

No. 04-1618

In The Supreme Court Of The United States

NORTHERN INSURANCE COMPANY OF NEW YORK,
PETITIONER,

v.

CHATHAM COUNTY, GEORGIA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

Whether an entity that does not qualify as an "arm of the State" for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit.

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BRIEF FOR SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY AS *AMICUS CURIAE* SUPPORTING RESPONDENT

INTEREST OF SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY [1]

The Southeastern Pennsylvania Transportation Authority ("SEPTA") is an agency and instrumentality of the Commonwealth of Pennsylvania, exercising the public powers of the Commonwealth to operate a mass-transit system within Philadelphia and its four contiguous counties. As an agency of the Commonwealth exercising public powers, the Pennsylvania General Assembly has granted

[1] Counsel of record for all parties have consented to the filing of this brief and the consents have been filed with the Clerk of the Court. No counsel for any party authored this brief, in whole or in part, and no person or entity other than SEPTA has made a monetary contribution to its preparation and submission.

SEPTA sovereign immunity. Indeed, SEPTA's entitlement to sovereign immunity has repeatedly been recognized by the state courts in Pennsylvania. Nevertheless, the Third Circuit, applying federal common law, has concluded that SEPTA is not an arm of the State for Eleventh Amendment immunity purposes. Assuming that the Third Circuit's decision is correct, unless SEPTA is entitled to immunity under the doctrine of residual sovereign immunity, SEPTA will be exposed to liability against the will of the sovereign.

The impact of such a result is not theoretical. If SEPTA is not entitled to immunity, SEPTA will continue to be exposed to liability under the Federal Employers' Liability Act ("FELA"). That exposure is largely passed through to the Commonwealth. SEPTA operates at a substantial operating deficit that is exacerbated by its exposure to FELA liability. As a consequence, in addition to direct funding from the Commonwealth for SEPTA's operating and capital budgets, SEPTA has received a series of recent financial bail outs from the state.

Stated plainly, unless SEPTA is entitled to invoke the doctrine of residual sovereign immunity, the fundamental purposes of state sovereignty will be undermined. First, the Commonwealth of Pennsylvania's dignity as a sovereign will be eroded if its agency can be summoned as a defendant against the State's will to answer the complaints of private persons. Second, as a practical matter, and as the last three budget years have demonstrated, the state is responsible for SEPTA's operating shortfalls. As a result, the Commonwealth's treasury is not shielded and Pennsylvania's ability to govern in accordance with the will of its citizens is undermined.

SUMMARY OF ARGUMENT

This Court has consistently recognized that dual sovereignty is a defining feature of our constitutional framework. A fundamental principle of sovereignty is the

flexibility of the sovereign to govern as it sees fit. Captured within that principle is the State's ability to create state agencies and authorities, delegate to those agencies and authorities an aspect of state power and cloak those entities with the State's sovereign immunity. Existing Eleventh Amendment jurisprudence, however, does not always recognize that such entities are arms of the State entitled to immunity. Consequently, the doctrine of residual sovereign immunity should be applied to preserve this critical component of federalism.

As an initial matter, the Eleventh Amendment does not define the scope of sovereign immunity. Rather, the Amendment is merely one particular exemplification of that immunity and the States retain a residual and inviolable sovereign immunity, which is embedded in our constitutional structure. The Circuit Court recognized that the principles of sovereignty are respected by according a county with immunity where that county is exercising delegated state power and the sovereign itself intends to extend its immunity to the county in performing that function.

The result below is also consistent with this Court's approach to deciding cases involving sovereign immunity. The recent jurisprudence of this Court establishes a methodology for resolving these issues. Critical to that inquiry is the recognition that the States entered into the Union with their sovereignty intact unless that sovereignty was clearly yielded in ratifying the Constitution. Here, the issue before the Court goes to the fundamental nature of sovereignty itself: the ability of the sovereign to govern as it sees fit. Stated differently, did the States retain the ability to create political subdivisions or agencies, delegate to those entities state power and cloak those entities with the States' sovereign immunity in performing those functions? It is simply unimaginable that the States surrendered this critical

component of their sovereignty when they ratified the Constitution.

Further, recognizing the doctrine of residual sovereign immunity where the State delegates an aspect of its power and cloaks its agency with sovereign immunity is consistent with the two fundamental purposes of sovereign immunity. First, it protects the dignity of the sovereign by not allowing its agency to be hauled into Court against its will. Second, it preserves the state treasury to the extent that the state may be ultimately responsible for the liability.

ARGUMENT

I. STATE SOVEREIGN IMMUNITY IS EMBEDDED IN OUR CONSTITUTIONAL STRUCTURE AND IS NOT LIMITED TO THE ELEVENTH AMENDMENT.

Because the concept of federalism is embedded in our constitutional structure, this Court has held that the Eleventh Amendment does not define the metes and bounds of a State's immunity from suit. As a consequence, the conclusion that a state-created entity does not qualify as an arm of the State under the Eleventh Amendment does not end the analysis. Rather, when faced with an issue of state sovereignty, a court should also examine the historical record mindful of the fundamental purposes of sovereignty to determine if the doctrine of residual sovereign immunity should be applied. A review of that historical record combined with an application of the fundamental purposes of state sovereignty as recognized by this Court yields only one logical result -- a state-created entity exercising state power and cloaked with the State's sovereignty under state law is entitled to sovereign immunity in the exercise of that power.

"[D]ual sovereignty is a defining feature of our Nation's blueprint." *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 751 (2002). Indeed, the States' "sovereign immunity [...] is embedded in

our constitutional structure and retained by the States when they joined the Union [....]" *Id.* at 754. "[F]ederalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999). As a consequence, states retain "a residuary and inviolable sovereignty. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Id.* at 715 (internal quotation and citation omitted).

An integral component of the States' "residuary and inviolable sovereignty is their immunity from private suits." *Federal Maritime Commission*, 535 U.S. at 751 (citations and quotations omitted). "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. [....] [T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." *Alden*, 527 U.S. at 715-16 (citations omitted). Indeed, "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Id.* at 713.

As Alexander Hamilton observed, unless there is a surrender of that immunity, it remains with the States:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State of the Union. Unless, therefore, there is a surrender of this

> immunity in the plan of the convention, it will remain with the States ....

Alexander Hamilton, The Federalist No. 81, p. 487-488 (C. Rossiter ed. 1961) (emphasis in original) (quoted in *Federal Maritime Commission*, 535 U.S. at 752).

A State's immunity from suit is reflected, in part, in the Eleventh Amendment and this Court's arm of the State cases. It has long been recognized, however, that "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Federal Maritime Commission*, 535 U.S. at 753. In fact, the Supreme Court "has repeatedly held that the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment." *Id.* at 754. Thus, in *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court held that sovereign immunity includes protection of a State from federal court suits brought by its own citizens, as well as by citizens of other States. *See also Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934) (applying state sovereign immunity to suits by foreign nations); *Alden*, 527 U.S. at 757 (1999) (holding that sovereign immunity shields States from private suits in state courts pursuant to federal causes of action); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (applying state sovereign immunity to suits by Indian tribes); *Ex parte New York*, 256 U.S. 490 (1921) (applying state sovereign immunity to admiralty proceedings); *Smith v. Reeves*, 178 U.S. 436 (1900) (applying state sovereign immunity to suits by federal corporations); *Federal Maritime Commission*, *supra* (applying state sovereign immunity to administrative proceedings).

In addition to its historical justification, this Court has recognized that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Federal*

Maritime Commission, 535 U.S. at 760 ("The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'") (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). "The principle of sovereign immunity preserved by constitutional design 'thus accords the States the respect owed them as members of the federation' . . . Private suits against nonconsenting states . . . present the 'indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties, regardless of the forum." *Alden*, 527 U.S. at 748-49 (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

Sovereign immunity also serves the important functions of shielding state treasuries and preserving the States' ability to govern in accordance with the will of their citizens. *Federal Maritime Commission*, 535 U.S. at 765; *Alden*, 527 U.S. at 750-51. Thus, underlying "constitutional form [....] are considerations of great substance." *Alden*, 527 U.S. at 750. "It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits [...]." *Id.* In an observation prescient of SEPTA's current circumstances, the *Alden* Court stated:

> Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens [....][which could] pose a severe and notorious danger to the States and their resources.

Id. Thus, failure to properly recognize sovereign immunity could "place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Id.* at 750-51. *Alden* further explained the practical importance of federalism on our modern representational system of government:

> Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of the State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc [....] If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

Id. at 751.

This Court's prior precedent undeniably teaches that state sovereign immunity is a founding principle of our Constitutional structure. That structure wisely preserved the States' ability to govern as they see fit, allowing the States to serve as "laborator[ies]" when they strive "to remould, through experimentation, . . . economic practices and institutions to meet changing social and economic needs." *New Ice State Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). A critical component of that structure is the State's authority to delegate its power to instrumentalities and agencies in accordance with the will of its citizens. *See Wisconsin Public Intervenor v. Mortier*, 501

U.S. 597, 607-08 (1991) (citing *Sailors v. Bd. of Ed. of Kent County*, 387 U.S. 105, 108 (1967)). Today, the Court must determine if the principles of federalism also permit the States to cloak their instrumentalities and agencies with their own sovereign immunity when exercising that state power. As explained below, an application of the methodology and reasoning of this Court's prior precedent demonstrates that it does.

II. WHERE AN AGENCY OR INSTRUMENTALITY OF THE STATE IS EXERCISING STATE POWER AND ENTITLED TO SOVEREIGN IMMUNITY UNDER STATE LAW, THE DOCTRINE OF RESIDUAL SOVEREIGN IMMUNITY PROTECTS THAT ENTITY FROM LIABILITY.

Before addressing the core issue, it is important to understand SEPTA's legal status. SEPTA was created by Pennsylvania statute to operate a mass-transit system within Philadelphia and its four contiguous counties. *See* 74 Pa.C.S. §§ 1701-1785. The Commonwealth of Pennsylvania has determined that SEPTA "shall in no way be deemed to be an instrumentality of any city or county or other municipality or engaged in the performance of a municipal function, but shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof." 74 Pa.C.S. § 1711(a). The Commonwealth also mandates that SEPTA shall "continue to enjoy sovereign and official immunity [...] and shall remain immune from suit except as provided by and subject to the provisions of 42 Pa.C.S. § 8501 (relating to definitions) through 8528 (relating to limitations on damages)." 74 Pa.C.S. § 1711(C)(3). Moreover, SEPTA's

entitlement to sovereign immunity has been repeatedly affirmed by the Pennsylvania state courts.[2]

Despite SEPTA's status as an instrumentality and agency of the State, exercising authority delegated to it by the State, and entitled to sovereign immunity under state law, the Third Circuit in *Bolden v. SEPTA*, 953 F.2d 807 (3d Cir. 1991), applying federal common law, concluded that SEPTA is not an arm of the State entitled to Eleventh Amendment immunity.[3] Thus, unless SEPTA can invoke the doctrine of residuary sovereign immunity, it will continue to be hauled into Court against the will of the sovereign and subject to liability.

Fortunately, this Court has developed a methodology for resolving issues regarding a State's residuary and immutable sovereignty. In *Federal Maritime Commission*, this Court set forth the proper framework for analyzing the boundaries of sovereign immunity. The question before the Court in *Federal Maritime Commission* was whether the

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[2] *See, e.g., Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Tulewicz v. SEPTA*, 606 A.2d 427 (Pa. 1992); *Feingold v. SEPTA*, 517 A.2d 1270 (Pa. 1986).

[3] As a consequence, SEPTA's position is similar to that of Chatham County. Just as the Eleventh Amendment prohibits admiralty suits against the state unless the state expressly waives its immunity and consents to suit, *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 473 (1987), the Eleventh Amendment also prohibits Federal Employers' Liability Act (FELA) suits against a non-consenting state. *See Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). Just as the State of Georgia has granted Chatham County sovereign immunity status under state law where exercising certain state powers, so has the Commonwealth of Pennsylvania granted sovereign immunity status to SEPTA. While SEPTA and Chatham County believe that a proper application of the Eleventh Amendment would recognize that they are entitled to immunity where exercising delegated state power and the sovereign intends the immunity to imply, the current, uncertain status of the Circuits' application of the arm of the State doctrine continues to expose them to liability.

States' sovereign immunity extends not only to federal judicial proceedings but also to proceedings before an administrative tribunal. The Court framed the question this way: "[Does] the sovereign immunity embedded in our constitutional structure and retained by the States when they joined the Union extend [] to FMC adjudicative proceedings[?]" 535 U.S. at 754.

Finding "a relatively barren historical record" from which to ascertain the intent of the Framers on this question, this Court observed that "[t]he Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state." 535 U.S. at 755 (citation and quotation omitted). Recognizing both the "interest in protecting States' dignity and the strong similarities between FMC proceedings and civil litigation," the *FMC* Court held that state sovereign immunity barred the Federal Maritime Commission from adjudicating private party complaints against a non-consenting State. The Court explained:

> Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the FMC.

535 U.S. at 760 (citation omitted).

Following the approach set forth in *Federal Maritime Commission*, the Court should ask whether the sovereign immunity embedded in our Constitutional structure and retained by the States when they joined the Union allows a State to create an agency or instrumentality, delegate state power to that entity and cloak that entity with sovereign immunity when exercising that power. Adopting

the reasoning of the Court in *Federal Maritime Commission*, it is hard to imagine that the Framers could have intended that the States could retain the power to create agencies and instrumentalities and bestow them with state power, without also retaining the power to cloak those entities with an essential attribute of sovereignty – sovereign immunity.

While the Framers could not have predicted the vast complexities of today's administrative state, they nonetheless intended that the States retain the flexibility to create instrumentalities pursuant to their reserved sovereignty. Indeed, this Court has observed that the States' residuary and inviolable sovereignty is reflected throughout the Constitution's text, which further "presupposes the continued existence of the States and [...] those means and instrumentalities which are the creation of their sovereign and reserved rights." *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 414-415 (1938)).

Historical evidence further suggests that the Framers intended that where the State creates "objects" or "functionaries" to perform delegated state powers, those entities may retain state sovereignty. On the question of drawing a proper line between the federal and state governments, Constitutional Convention delegate James Wilson from the Commonwealth of Pennsylvania stated:

> It was easy to discover a proper and satisfactory principle on that subject. ***Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state***; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be

> considered as belonging to the government of the United States.

2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution at 424 (Jonathan Elliott ed., 2d ed. 1836) (emphasis added). In short, the Framers clearly understood that the States would be able to organize their affairs as they saw fit -- including creating agencies and instrumentalities, delegating to those entities state power and cloaking those entities with sovereign immunity.

This understanding was reinforced early on in our nation's history. Justice Joseph Story, making remarks in 1833 "respecting the political rights and sovereignty of the several colonies, and of the union which was thus spontaneously formed by the people of the United Colonies, by the declaration of independence" in his *Commentaries on the Constitution* observed:

> The sovereignty of a nation or state, considered with reference to its association, as a body politic, may be absolute and uncontrollable in all respects, except the limitations which it chooses to impose upon itself. But the sovereignty of the government, organized within the state, may be of a very limited nature. It may extend to a few, or to many objects. It may be unlimited, as to some; it may be restrained, as to others. To the extent of the power given, the government may be sovereign, and its acts may be deemed the sovereign acts of the state. Nay, ***the state, by which we mean the people composing the state, may divide its sovereign powers among various functionaries, and each, in the limited sense, would be sovereign in respect to the powers confided to each***, and dependent in all other cases. Strictly speaking,

> in our republican forms of government, the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each state, not granted to any of its public functionaries, is in the people of the state.

1 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 64-65 (Jonathan Elliott ed., 2d ed. 1836) (emphasis added). Thus, the State may divide its power among its various functionaries and convey sovereignty to those functionaries "in respect to the powers confided to each."

As in *Federal Maritime Commission*, "we cannot imagine" that the Framers intended that the States retained the freedom and flexibility to delegate their sovereign power among various functionaries without also retaining the authority to convey to those entities the benefits of sovereign immunity. Indeed, the concept that the States could not bestow state-created entities, exercising state power, with sovereign immunity is at odds with the fundamental well-being of those agencies and instrumentalities. *Alden* teaches that sovereign immunity is essential to the State's ability to govern in accordance with the will of the people so as to "allocate[e] [...] scarce state resources among competing needs and interests." *Alden v. Maine*, 527 U.S. at 750-51. Without the protection of sovereign immunity, States could face the "staggering burdens" upon the treasury of unlimited liability in suits for compensatory damages, attorney's fees and punitive damages. *Id.* Such protection is equally essential to the integrity of the agencies and instrumentalities of the State exercising state power.

The financial ramifications for an entity like SEPTA only underscore this point. SEPTA is a public transit authority and agency of the Commonwealth of Pennsylvania,

exercising state power and entitled to sovereign immunity under state law. SEPTA also faces a projected annual deficit for fiscal year 2007 of $ 72 million.[4] It is the will of the sovereign Commonwealth of Pennsylvania that SEPTA have sovereign immunity from suit, including immunity from actions under FELA.[5] It is further the will of the sovereign that injured SEPTA workers have a more limited remedy under state workers compensation laws.[6] These choices by the Commonwealth of Pennsylvania represent a fair "allocation of scarce resources among the competing needs and interests [of the citizens] which lies at the heart of the political process." *Alden*, 527 U.S. at 750-751. Failure to recognize Pennsylvania's will to govern in this way would have a substantial financial impact on the State and be no less than "an affront to the State's dignity." *Federal Maritime Commission*, 535 U.S. at 760.

In sum, the flexibility of the State to create agencies and instrumentalities to exercise delegated state power with the cloak of sovereign immunity is fundamental to the State's sovereignty. Because Eleventh Amendment

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[4] Over the past ten years, SEPTA has faced significant financial challenges, resulting in two work force reductions and several hiring freezes. As a result of SEPTA's financial difficulties, the amount of funding it receives from the Commonwealth has increased considerably, so that it now receives over half of its funding from the Commonwealth. SEPTA has received millions of dollars in financial "bail outs" from the Commonwealth.

[5] 45 U.S.C. § 51 *et seq.* FELA permits unlimited recoveries for pain and suffering and allows the jury to determine the nature and extent of future wage losses that will be compensated. *See Welch v. Texas Dept. of Highways*, 483 U.S. 468, 476-478 (1987).

[6] 77 Pa.C.S. § 1 *et seq.* The Pennsylvania workers' compensation law provides schedules and formulas allowing for recovery for defined types of economic losses.

jurisprudence does not always recognize this, it is essential that the doctrine of residuary and inviolate sovereign immunity be applied to preserve this fundamental element of federalism embedded in our Constitutional structure.

III. RECOGNIZING RESIDUAL SOVEREIGN IMMUNITY WHERE A STATE-CREATED ENTITY IS EXERCISING STATE POWER AND IS ENTITLED TO IMMUNITY UNDER STATE LAW IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE IN OTHER AREAS WHILE THE PETITIONER'S APPROACH IGNORES HISTORY AND UNDERMINES THE FUNDAMENTAL PURPOSES OF SOVEREIGNTY.

This Court has recognized that state-created entities exercising state power are entitled to immunity under analogous circumstances. In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court enunciated a similarly principled approach to the determination of a State's immunity from suit under federal antitrust laws. There, the Court held that the State is immune from liability where the state-created entity is engaged in activity undertaken pursuant to explicit state authorization. *Id.* at 350-51. Thus, under *Parker*, state-created entities, including political subdivisions and state agencies, enjoy immunity from federal antitrust actions where they have acted pursuant to an unequivocal mandate or authorization from the State. This principled approach is consistent with the Court's developing doctrine of residual sovereign immunity, and lends further support to an affirmance of the Eleventh Circuit here.[7]

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[7] The Court's jurisprudence under the Eleventh Amendment arm of the State doctrine is increasingly cognizant of the importance of state law, and the State's treatment of the entity. *See e.g. Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (acknowledging the importance of the States' treatment of the entity); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1979) (looking to the nature of the entity created under state law and the degree of funding and

Under the Petitioner's analysis, there is to be a singular approach to sovereign immunity where the federal courts, utilizing federal common law, apply the arm of the State test to determine issues of that sovereignty. ("[T]here is only one species of sovereign immunity which is embodied in the constitutional structure [.]" Petitioner's Brief, Summary of Argument). Thus, under the Petitioner's reasoning, if the federal court determines that the state entity is not an arm of the State, the analysis ends – even if the sovereign itself disagrees.

Petitioner's "singular" approach disregards the State's residuary and inviolable sovereignty and ignores the Court's methodology for determining the scope of state sovereign immunity. *Federal Maritime Commission* teaches that the Eleventh Amendment is but one exemplification of sovereign immunity and is not co-extensive with the state sovereignty that is embedded in our constitutional structure. The proper methodology to determine the scope of that immunity requires first an examination of the historic record to determine whether the Framers intended that this aspect of sovereignty be retained with the States. Next, the Court must examine whether the fundamental purposes of sovereign immunity, respect for the dignity of the State and protection of the state treasury, are furthered by a recognition of sovereign immunity under the circumstances. Petitioner disregards the Court's approach because it leads inevitably to

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guidance it received from the State). In fact, a review of the early case law on the doctrine indicates that the application of federal common law developed as an historic accident as the mechanism for analysis. *See Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1 (1889) (the first case to consider the doctrine pertained to the District of Columbia where federal law applied to determining its status); *Lincoln County v. Luning*, 133 U.S. 529 (1890) (applying *Metropolitan Railroad* and denying immunity to a local county where the Nevada Constitution had explicitly provided for county liability to suit).

this result: that a state-created agency or instrumentality, exercising delegated state power and entitled to immunity under state law, must be accorded the dignity of sovereign immunity.[8]

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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[8] The main authorities relied on by Petitioner are not inconsistent with this conclusion. In *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), the agency was formed by a compact between the States of Nevada and California. Both States disclaimed any intent to confer immunity on the agency, and the compact expressly stated that the agency was not an arm of the State and that its obligations would not be binding on either State. Similarly, *Jinks v. Richland County*, 538 U.S. 456 (2003) concerned a local county jail, and the exercise of purely local power. *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, *supra*, concerned a local school board not treated as part of the "State" under state law.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NORTHERN INSURANCE COMPANY OF NEW YORK *v.* CHATHAM COUNTY, GEORGIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04–1618. Argued March 1, 2006—Decided April 25, 2006

Petitioner insurance company filed this admiralty suit against respondent County seeking damages resulting from a collision between a malfunctioning County drawbridge and a boat insured by petitioner. Granting the County summary judgment, the District Court recognized that Eleventh Amendment immunity from suit does not extend to counties, but relied on Circuit precedent to conclude that sovereign immunity extends to counties and municipalities that, as here, exercise power delegated from the State. The Eleventh Circuit, which was bound by that same precedent, affirmed. It acknowledged that the County did not assert an Eleventh Amendment immunity defense, which would fail because, under other Circuit precedent, the County did not qualify as an "arm of the State." The Court of Appeals nonetheless concluded that common law has carved out a "residual immunity" that protects political subdivisions such as the County from suit.

Held: An entity that does not qualify as an "arm of the State" for Eleventh Amendment purposes cannot assert sovereign immunity as a defense to an admiralty suit. Pp. 3–7.

(a) Immunity from suit "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden* v. *Maine*, 527 U. S. 706, 713. Thus, the phrase " 'Eleventh Amendment immunity' . . . is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Id.*, at 713. Because preratification sovereignty is the source of immunity from suit, only

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States and arms of the State possess immunity from suits authorized by federal law. See, *e.g.*, *id.*, at 740. Accordingly, sovereign immunity does not extend to counties, see, *e.g.*, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 401, and n. 19, even when they "exercise a 'slice of state power,' " *id.*, at 401. The County argues unconvincingly that this Court has recognized a distinct "residual" immunity that permits adoption of a broader test than it applies in the Eleventh Amendment context to determine whether an entity is acting as an arm of the State entitled to immunity. The Court has referenced only the States' "residuary and inviolable sovereignty" that survived the Constitution. See, *e.g.*, *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 751. Because the County may claim immunity neither based upon its identity as a county nor under an expansive arm-of-the-State test, it is subject to suit unless it was acting as an arm of the State, as delineated by this Court's precedents, in operating the drawbridge. *E.g.*, *Alden*, *supra*, at 756. The County conceded below that it was not entitled to Eleventh Amendment immunity, and both the County and the Eleventh Circuit appear to have understood this concession to be based on the County's failure to qualify as an "arm of the State" under this Court's precedent. Moreover, certiorari was granted in this case premised on the conclusion that the County is not an arm of the State for Eleventh Amendment purposes, and this Court presumes that to be the case. The County's concession and this Court's presumption are dispositive. Pp. 3–5.

(b) The County's alternative argument that the Court should recognize a distinct sovereign immunity against *in personam* admiralty suits that bars cases arising from a county's exercise of core state functions with regard to navigable waters is rejected. Such recognition cannot be reconciled with the Court's precedents, which applied the general principle that sovereign immunity does not bar a suit against a city to an admiralty suit as early as *Workman* v. *New York City*, 179 U. S. 552, 570. The Court disagrees with the County's contention that *Workman* does not govern the instant case under *Ex parte New York*, 256 U. S. 490, 498, where, in extending sovereign immunity beyond cases "in law or equity" to admiralty cases, the Court concluded that *Workman* involved only substantive admiralty law, not the power of the Court to exercise jurisdiction over a particular defendant. But *Workman* did so precisely because the Court there held that admiralty courts have jurisdiction over municipal corporations. See 179 U. S., at 565. The *Workman* Court accordingly distinguished between the question before it—whether admiralty courts may, notwithstanding state law, "redress a wrong committed by one over whom such courts have adequate jurisdiction," *id.*, at 566, such as a municipal corporation—

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and the question *not* before it, but before the Court in *Ex parte New York*—whether admiralty courts may "give redress in a case where jurisdiction over the person or property cannot be exerted," 179 U. S., at 566. In the former circumstance, the court should apply general admiralty principles, while in the latter the court lacks the power to do so. See *id.*, at 570; *Ex parte New York*, *supra*, at 499–500, 502–503. Because here, as in *Workman* and in contrast to *Ex parte New York*, the defendant was an entity generally within the District Court's jurisdiction, *Ex parte New York* is inapposite, and *Workman* compels the conclusion that the County is unprotected by sovereign immunity. Pp. 5–7.

129 Fed Appx. 602, reversed.

THOMAS, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1618

NORTHERN INSURANCE COMPANY OF NEW YORK, PETITIONER *v.* CHATHAM COUNTY, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 25, 2006]

JUSTICE THOMAS delivered the opinion of the Court.

Petitioner Northern Insurance Company of New York (Northern) filed suit against respondent Chatham County, Georgia (County), in the United States District Court for the Southern District of Georgia, seeking damages resulting from an alleged tort committed by employees of the County. The District Court granted the County's motion for summary judgment on the ground that the suit was barred by sovereign immunity. Relying on Circuit precedent, the Court of Appeals for the Eleventh Circuit affirmed. We granted certiorari to consider "[w]hether an entity that does not qualify as an 'arm of the State' for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit." 546 U. S. ___ (2005).

I

The County owns, operates, and maintains the Causton Bluff Bridge, a drawbridge over the Wilmington River. On October 6, 2002, James Ludwig requested that the bridge be raised to allow his boat to pass. The bridge malfunctioned, a portion falling and colliding with Mr. Ludwig's

boat. As a result of the collision, Mr. Ludwig and his wife incurred damages in excess of $130,000.

The Ludwigs submitted a claim for those damages to their insurer, Northern, which paid in accordance with the terms of their insurance policy. Northern then sought to recover its costs by filing suit in admiralty against the County in the District Court. The County sought summary judgment, arguing that Northern's claims were barred by sovereign immunity. The County conceded that Eleventh Amendment immunity did not extend to counties, but nonetheless contended that it was immune under "the universal rule of state immunity from suit without the state's consent." Defendant's Brief in Support of Motion for Summary Judgment, Case No. CV403–099, App. 33a. The District Court agreed, relying on *Broward County* v. *Wickman*, 195 F. 2d 614 (CA5 1952), to conclude that sovereign immunity extends to counties and municipalities that, as here, "exercis[e] power delegated from the State." *Zurich Ins. Co.* v. *Chatham County*, No. CV403–99, App. 77a.

The Eleventh Circuit, which was bound to follow *Wickman* as Circuit precedent, affirmed.[1] The Court of Appeals acknowledged that the County did not assert an Eleventh Amendment immunity defense, which would fail because, under Circuit precedent, the County did not qualify as an arm of the State. *Zurich Ins. Co.* v. *Chatham County*, No. 04–13308 (Jan. 28, 2005), App. 83a, n. 1, judgt. order reported at 129 Fed. Appx. 602. The Court of Appeals nonetheless concluded that "common law has carved out a 'residual immunity,' which would protect a political subdivision such as Chatham County from suit." App. 83a. We granted certiorari to review the judgment of the Court of Appeals. 546 U. S. ___ (2005).

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[1] See *Bonner* v. *Prichard*, 661 F. 2d 1206, 1209 (CA11 1981) (en banc) (adopting all decisions of the former Fifth Circuit announced prior to October 1, 1981, as binding precedent in the Eleventh Circuit).

II

This Court's cases have recognized that the immunity of States from suit "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden* v. *Maine*, 527 U. S. 706, 713 (1999); see *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 55–56 (1996); *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 322–323 (1934). Consistent with this recognition, which no party asks us to reexamine today, we have observed that the phrase "'Eleventh Amendment immunity' . . . is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden*, *supra*, at 713.

A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law. See *Alden*, *supra*, at 740; *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 280 (1977). Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 401 (1979); *id.*, at 401, n. 19 (gathering cases); *Workman* v. *New York City*, 179 U. S. 552, 565 (1900); *Lincoln County* v. *Luning*, 133 U. S. 529, 530 (1890). See also *Jinks* v. *Richland County*, 538 U. S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit"). This is true even when, as respondent alleges here, "such entities exercise a 'slice of state power.'" *Lake Country Estates*, *supra*, at 401.

The County argues that this Court's cases recognize a distinct "residual" immunity that permits adoption of a broader test than we apply in the Eleventh Amendment

context to determine whether an entity is acting as an arm of the State and is accordingly entitled to immunity.[2] Brief for Respondent 28. But this Court's use of that term does not suggest the County's conclusion; instead, this Court has referenced only the States' "residuary and inviolable sovereignty" that survived the Constitution. See The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison); *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 751 (2002).

Because the County may claim immunity neither based upon its identity as a county nor under an expansive arm-of-the-State test, the County is subject to suit unless it was acting as an arm of the State, as delineated by this Court's precedents, in operating the drawbridge. *Alden*, *supra*, at 756; *Lake Country Estates*, *supra*, at 400–401. The County conceded below that it was not entitled to Eleventh Amendment immunity, and both the County and the Court of Appeals appear to have understood this concession to be based on the County's failure to qualify as an arm of the State under our precedent. See App. 83a, n. 1 (recognizing that the County rightly disclaimed an Eleventh Amendment immunity defense because such a defense would be inconsistent with the court's holding in *Vierling* v. *Celebrity Cruises, Inc.*, 339 F. 3d 1309 (CA11 2003), that the Broward County Port Authority was not an arm of the State); Brief of Appellee Chatham County in

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[2] It is unclear whether respondent believes that residual immunity is a common-law immunity that has been unaltered by federal substantive law, see Brief for Respondent 18 ("Chatham County's sovereign immunity derives from the common law which pre-dates Eleventh Amendment immunity"), or, as the Solicitor General appears to believe, a constitutionally based immunity that is distinguishable from the one drawn from the constitutional structure, see Tr. of Oral Arg. 16 ("What respondent calls residual sovereign immunity . . . is the doctrine of constitutional sovereign immunity"). In either case, it appears that the residual immunity would serve to extend sovereign immunity beyond its preratification scope.

No. 04–13308DD (CA11), p. 13 (distinguishing *Vierling* in part because it dealt with the question of Eleventh Amendment immunity); see also Brief for Respondent 8 (implicitly conceding that respondent is not an arm of the State under our Eleventh Amendment jurisprudence). Moreover, the question on which we granted certiorari is premised on the conclusion that the County is not "an 'arm of the State' for Eleventh Amendment purposes," 546 U. S. ___ (2005), and we presume that to be the case. Accordingly, the County's concession and the presumption underlying the question on which we granted review are dispositive.

As an alternative ground for affirmance, the County asks the Court to recognize a distinct sovereign immunity against *in personam* admiralty suits that bars cases arising from a county's exercise of core state functions with regard to navigable waters. Recognition of a distinct immunity in admiralty cases cannot be reconciled with our precedents. Immunity in admiralty, like other sovereign immunity, is simply an application of "the fundamental rule" that "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given." *Ex parte New York*, 256 U. S. 490, 497–500 (1921). Accordingly, this Court has resolved sovereign immunity questions in admiralty by relying upon principles set out in this Court's sovereign immunity cases, rather than by examining the history or jurisprudence specific to suits in admiralty. See *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, *supra*, at 754–769 (an admiralty suit relying heavily on *Alden*, *supra* (plaintiff raised a Fair Labor Standards Act of 1938 claim), and *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996) (plaintiff alleged violation of the Indian Gaming Regulatory Act)). Indeed, the Court applied the general principle that sovereign immunity does not bar a suit against a city to an admiralty suit

as early as *Workman* v. *New York City*, 179 U. S. 552, which held that such immunity "afforded no reason for denying redress in a court of admiralty for the wrong which . . . [had] been committed" by the city of New York, *id.*, at 570.

The County nonetheless contends—and the Eleventh Circuit, in reliance upon the Fifth Circuit's analysis in *Wickman*, held—that the reach of *Workman* is limited, and that this Court's decision in *Ex parte New York*, *supra*, demonstrates that *Workman* does not govern the instant case. See *Wickman*, 195 F. 2d, at 615. We disagree. *Ex parte New York* extended sovereign immunity beyond cases "in law or equity" to cases in admiralty. As the County points out, *Ex parte New York* concluded that *Workman* involved only the substantive law of admiralty, and not the power of the Court to exercise jurisdiction over a particular defendant. *Ex parte New York*, *supra*, at 498. But *Workman* dealt only with the substantive law of admiralty precisely because the *Workman* Court held that admiralty courts have jurisdiction over municipal corporations. See 179 U. S., at 565 ("[A]s a general rule, municipal corporations, like individuals, may be sued; in other words . . . they are amenable to judicial process for the purpose of compelling performance of their obligations"). The *Workman* Court accordingly distinguished between the question before it—whether courts of admiralty may, notwithstanding state law, "redress a wrong committed by one over whom such courts have adequate jurisdiction," *id.*, at 566, such as a municipal corporation—and the question *not* before it, but before the Court in *Ex parte New York*—whether courts of admiralty may "give redress in a case where jurisdiction over the person or property cannot be exerted," 179 U. S., at 566. In the former circumstance, the court should apply general admiralty principles, while in the latter the court lacks the power to do so. See *id.*, at 570; *Ex parte New York*, *supra*, at 499–500, 502–503. Because

here, as in *Workman* and in contrast to *Ex parte New York*, the defendant was an entity generally within the jurisdiction of the District Court, *Ex parte New York* is inapposite, and *Workman* compels the conclusion that the County is unprotected by sovereign immunity.

* * *

Because the County has failed to demonstrate that it was acting as an arm of the State when it operated the Causton Bluff Bridge, the County is not entitled to immunity from Northern's suit. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.